# THE LAW OF THE AIR

(The Tagore Law Lectures of 1931)

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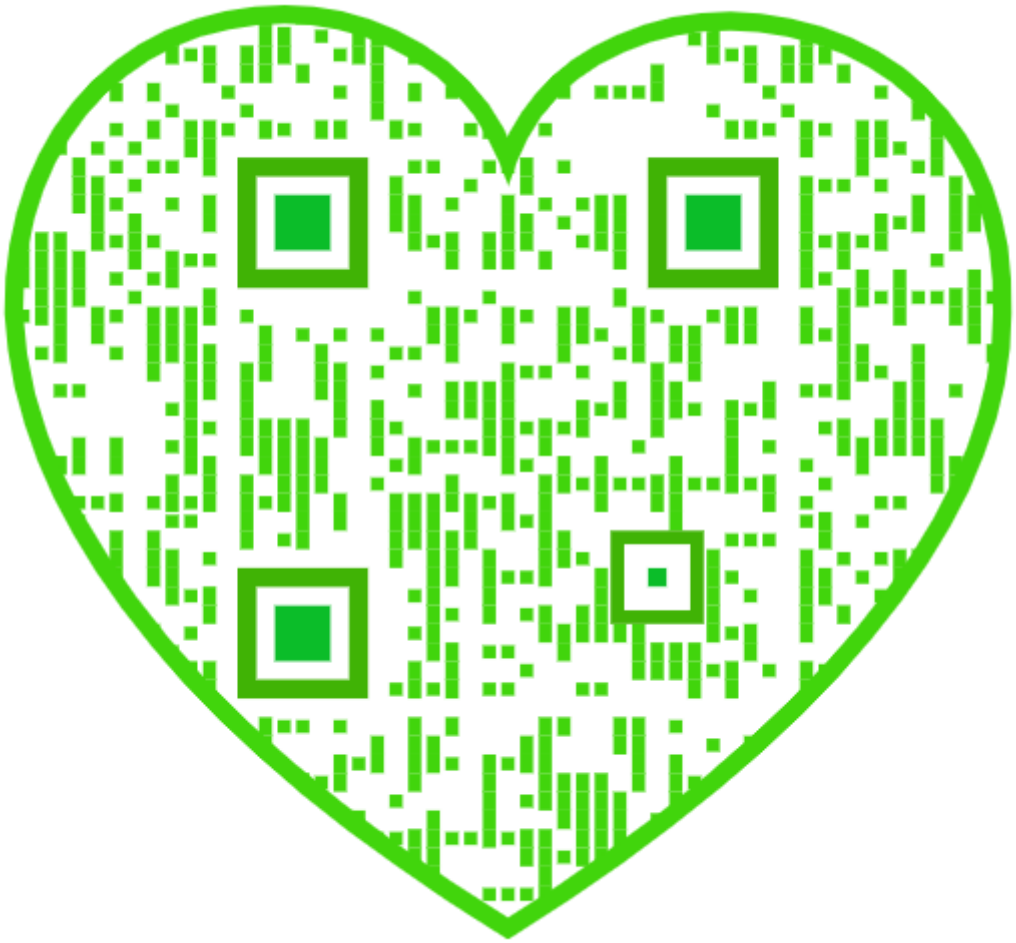

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TO

WILLIAM WARWICK BUCKLAND

# PREFACE

THE origin of this book is that in the year 1930 the Air Ministry, having been asked to find an English lawyer who would go to Chicago and deliver a course of lectures upon English Air Law at the Air Law Institute, which is located in and affiliated with the Northwestern University, Chicago, put forward my name. In due course I went and took part in a conference in which the law of the air was stated comparatively—the French and the international law by Captain Albert Roper, the General Secretary of the International Commission for Air Navigation; the American law by Mr. Louis G. Caldwell, Mr. George B. Logan, Professor Carl Zollmann, and Professor Fred D. Fagg, jun.; and the English law (at least, so I hope) by myself.

In 1931 an invitation to deliver the Tagore Law Lectures in the University of Calcutta afforded an opportunity of examining the law of the air in greater detail, and the obligation which rests upon the Tagore Law Professor to publish his lectures is now discharged by the publication of this volume—a task which will be primarily associated in my memory with much kindness received and many new friendships made in Chicago and in India.

In preparing my lectures I received help from several quarters. Major K. M. Beaumont, D.S.O., of Messrs. Beaumont & Son, the solicitors to Imperial Airways, Limited, Captain A. G. Lamplugh, F.R.Ae.S., Underwriter of the British Aviation Insurance Company, Limited, Mr. R. L. Megarry, O.B.E., legal adviser to the Air Ministry, Dr. J. M. Spaight, C.B.E., of the Air Ministry, and my brother, Mr. W. L. McNair, each read portions of my manuscript, and gave me much assistance by their comments upon it. To all of these

gentlemen I give my sincere thanks, but I cannot make it too clear that the responsibility for the contents of the volume is mine alone, and that none of them must be regarded as identified with any views which I have expressed in it.

Imperial Airways, Limited, as a member of the International Air Traffic Association, has been so good as to allow me to print in the Appendices the two sets of General Conditions which at present govern, and will for some considerable period in the future govern, the greater part of European international air transport.

To my friend, Dr. H. C. Gutteridge, K.C., Fellow of Trinity Hall, I am under a particular debt, for he has read the whole book in proof. Others who have been tempted by his unselfishness to avail themselves of his legal knowledge and judgment in this way, know how stimulating and profitable is his criticism, and how reassuring is his approval.

The scope of the volume is indicated in Chapter 1.

A. D. McN.

2, GARDEN COURT, TEMPLE.
*March*, 1932.

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# THE LAW OF THE AIR

## CHAPTER 1

### INTRODUCTORY AND INTERNATIONAL

§ 1. The aim of this volume is to state the aeronautical law of England. No attempt will be made to examine other uses of the air and the air space, such as wireless telegraphy and telephony and broadcasting. Nor would it be within my scope to deal with the public international law of aerial navigation if that aspect had not materially conditioned the rules of English law; to that extent I must refer to public international law and to the principal conventions to which Great Britain is a party.

After disposing of the international aspect in this chapter, we shall turn to examine English law, and firstly the rules governing liability for damage done by or from aircraft. For reasons which will appear, and will, I hope, be considered adequate, it has been found impossible to ignore the principles of the common law (including that obscure maxim *cujus est solum, ejus est usque ad coelum et ad inferos*) and to be content with the statutory compromise imposed upon the man in the air and the man on the ground by section 9 of the Air Navigation Act of 1920. A chapter on Jurisdiction in respect of Aircraft will involve the examination of some principles of the Conflict of Laws, less happily termed "private international law." Then we shall examine the principles governing the Contract of Carriage by Aircraft, both as to Goods and as to Passengers, and shall refer to the General Transport Conditions upon which the leading British and European air traffic companies at present carry.

We shall then examine, under the title of "Maritime Analogies, Apparent and Real," the question how far

the seductive analogy of the ship automatically applies as a matter of common law, or has been specifically applied by statute, to aircraft. We shall then discuss the Common Law Possessory Lien and Claims for Necessaries, Aircraft Charterparties and Insurance, and, finally, we shall summarize a number of technical topics which are of more interest to the aviator than to the lawyer. We shall endeavour to state the law as it is rather than, as it seems to us, it logically should be, but there will be occasions upon which that is not possible, and it will be necessary to look into the future and hazard a few suggestions.

§ 2. Until after the Great War the only aspects of aerial navigation which had engaged the serious attention of English lawyers, and, indeed, of the lawyers of almost any country, were the rules of public international law and of the Conflict of Laws which ought to govern it. Into the controversy which centred upon the question of sovereignty in the air it is now unnecessary for us to enter further than to sum up the principal competing theories. The best guide to that controversy for the English reader is Professor Hazeltine's *Law of the Air*.[1]

Over the high seas, it was generally admitted that the air space was free. But as regards the air space over land, including internal and territorial waters, we may reduce the competing theories to three, or possibly four.

(1) *That the air space is free, subject only to the rights of States required in the interests of their self-preservation.* This theory, which will always be associated with the name of its champion, Fauchille, was adopted by the Institute of International Law in 1906. It rests mainly on the argument that the air is physically incapable of appropriation because it cannot be actually and continuously occupied. That is substantially the same as one of the arguments of Grotius in favour of the freedom

[1] University of London Press (1911). See also the bibliography on pp. 145–152 of that book and, amongst post-war books, Mukerjea, *The Problems of Aerial Law*, Calcutta (1924); Zollman, *Law of the Air*, Milwaukee (1927); Roper, *La Convention Internationale du 13 octobre 1919 portant Réglémentation de la Navigation Aérienne*, Paris (1930); and Lauterpacht, *Private Law Sources and Analogies of International Law* (1927), §§ 47, 48.

of the seas. Sovereignty implies the possibility of occupation, and it was argued that since occupation of the air is impossible, there can be no sovereignty in the air. But sovereignty does not really involve continual presence any more than private law possession does. A State can exercise sovereignty over a huge desert, or the summit of an uninhabitable mountain, if it is in *de facto* control and is in a position to suppress internal disorder and repel external attack. In that sense a State does control the air space above it.

(2) The second theory was that *upon the analogy of the maritime belt or territorial waters there is over the land and waters of each State a lower zone of territorial air space and a higher, and unlimited, zone of free air space.*

(3) The third theory was *that a State has complete sovereignty in its superincumbent air space to an unlimited height*, thus applying the *cujus est solum* maxim in its crude form.

(4) The fourth theory was the third *with the addition of a servitude of innocent passage for foreign non-military aircraft*, akin to the right of innocent passage of merchant ships through territorial waters.

The Great War brought about a realization of the importance of aerial navigation and of its potential danger to the subjacent State and its inhabitants. It is therefore not surprising to find now the almost universal adoption by international treaty and by national legislation of the theory of complete sovereignty (number 3 above), subject to a mutual, carefully safeguarded, and easily determinable treaty right of free entry and passage for the non-military aircraft of foreign countries.

§ 3. *International Conventions.*—Thus the first article of the Convention for the Regulation of Aerial Navigation, signed at Paris on October 13, 1919, is as follows :

> " The High Contracting Parties recognize that every Power has complete sovereignty over the air space above its territory.
>
> " For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the Mother Country and of the Colonies, and the territorial waters adjacent thereto."

To this Convention there are now the following twenty-nine parties : Australia, Belgium, Bulgaria, Canada, Chile, Czecho-Slovakia, Denmark, Finland, France, Great Britain and Northern Ireland, Greece, Holland, India, Iraq, Irish Free State, Italy, Japan, New Zealand, Norway, Persia, Poland, Portugal, Roumania, Saar Territory, Siam, South Africa, Sweden, Uruguay, Yugoslavia. The United States of America signed but did not ratify. (The International Commission created by the Convention is commonly known as " CINA ".)

Again, the first article of the Ibero-American Convention signed at Madrid on November 1, 1926, is in identical terms. It was signed by twenty-one States, and has been ratified by the following : Argentine, Costa Rica, Dominican Republic, Mexico, Salvador, Paraguay, Spain. (The International Commission created by it is commonly known as " CIANA ".)

To the same effect is the first article of the Pan-American Convention relating to Commercial Aviation signed at Havana on February 20, 1928, which was signed by twenty-one States, and has been ratified by at least the following five : Guatemala, Mexico, Nicaragua, Panama, and the United States of America.

The same principle underlies numerous bilateral conventions, and may be regarded as almost universally accepted. Even when it is not expressly declared in a convention, it may safely be assumed that the convention is based upon it.[1]

It is true that *pacta tertiis nec nocent nec prosunt*, but in view of this overwhelming body of opinion it must now be acknowledged that the pre-war controversy upon this important question of theory is closed, and that the

[1] A valuable analysis of existing conventions will be found in two contributions by Dr. Hans Oppikover and M. Salvatore Cacopardo to a volume entitled *Enquiries into the Economic Administrative and Legal Situation of International Air Navigation*, published by the League of Nations, 1930, No. C. 339. M. 139, 1930, viii. Among the bilateral treaties of a general character to which Great Britain is a party may be mentioned the following : one with Switzerland, dated December 9, 1919 ; another with Germany, dated June 29, 1927, Treaty Series No. 1 (1928) ; and another with Italy, dated May 16, 1931, Cmd. 3892. There are others, dealing with such matters as Mails, Customs, Direction-finding : see Cacopardo, *op. cit.*, p. 207. For a list of international agreements relating to aviation up to January 1, 1930, see Hudson in *American Journal of International Law*, xxiv. (1930), pp. 161–168.

principle of complete sovereignty in the air space reigns supreme. The fact that most States are willing to exchange a mutual right of entry and passage by treaty no more derogates from the principle of national sovereignty than does the admission of foreign ships to purely national rivers by the Barcelona Convention of 1921 upon Navigable Waterways of International Concern.

In the domestic or national sphere the same principle has been established throughout the world ;[1] for instance, the British Air Navigation Act of 1920 recites in its preamble that

> " the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto."

As the Paris Convention of 1919 is the direct cause of the British Air Navigation Act, 1920, we must devote a very short space to the examination of some of the provisions of the Convention[2] before we leave the international sphere and turn to the law of England. But this is not a treatise upon the public international law of the air, and we are only interested in the Convention to the extent of its influence upon English law.[3]

§ 4. Article 1, quoted above, proclaims the doctrine of complete national sovereignty in the superincumbent air space. This article looks in two directions, outwards and inwards. In the first place, it asserts the primary right of a State to exclude foreign aircraft from its air space. In the second place, as we shall see in the later chapter on Jurisdiction, it establishes the subjection of aircraft and personnel within national air space to the sovereignty of the local State.

By article 2

> " each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft

[1] It is said, by Oppikofer, *op. cit.*, at p. 112, that Peru constitutes an exception. It has proclaimed by decree freedom of aviation at an altitude above 3,000 metres.

[2] For the text of the Convention, see Appendix A.

[3] For an analysis of the Convention, see Cacopardo, *op. cit.*, and Roper, and Mukerjea, ch. iii.

of the other contracting States, provided that the conditions laid down in the present Convention are observed." [1]

Moreover, in the admission of foreign aircraft the same article forbids discrimination based upon nationality. I do not think it does, or is intended to, provide for "national treatment," that is to say, to require that foreign aircraft shall be treated in exactly the same way as national aircraft. Article 5 as amended by a Protocol of October 27, 1922, prohibits a State, except by a special and temporary authorization, to admit any aircraft possessing the nationality of any State which is not a contracting party, unless it has concluded a special convention with that State upon the same lines as the Convention of 1919 and without infringing the rights of the parties thereto.

Articles 3 and 4 relate to prohibited areas, which a State may proclaim on the grounds of military reasons or public safety and from which it may exclude all aircraft provided that its own private aircraft are comprised in the prohibition.

Articles 6 to 10 inclusive relate to the registration and nationality of aircraft. We shall revert to this matter later in considering the applicability of the analogy of ships to aircraft. Meanwhile, let us note that the registration of an aircraft in a State confers the nationality of that State upon it. Registration is also a condition of the immunity from certain kinds of action conferred by section 9 of the British Act of 1920, but it is not a condition of the liability to action imposed by the same section.

Articles 11 to 13 inclusive relate to the certificates of airworthiness which aircraft must have and carry, and the certificates of competency which the commanding officer, pilots, engineers and other members of the operating crew must have and carry. Article 14 requires a special licence, from the State whose nationality an aircraft possesses, for the carriage of wireless apparatus.

By article 15, supplementing article 2, "every aircraft of a contracting State has the right to cross the air

[1] Note the importance of compliance with these conditions as a condition precedent to obtaining the benefit of section 9 of the Act of 1930.

space of another State without landing," but it must follow prescribed routes and may for reasons of general security be ordered to land. "The establishment of international airways shall be subject to the consent of the States flown over," and the meaning of "airways" is controversial.[1]

Article 16 enables a State, upon the analogy of *cabotage*, to exclude foreign aircraft from local traffic for hire, both as to passengers and as to goods, and article 17 permits retaliation.

Article 18 exempts foreign aircraft, subject to the deposit of security, from exemption from detention on the ground of the infringement of a "patent, design or model."

Articles 19 to 21 deal with the certificates, log-books, and other documents, which, somewhat upon the analogy of "ship's papers," aircraft must carry. Article 22 confers, what indeed common humanity demand, namely, "national treatment" in relation to assistance in landing. Article 23 applies "with regard to the salvage of aircraft at sea the principles of maritime law" and will be discussed later.[2]

Article 24 makes all public aerodromes in a contracting State open to the aircraft of all the other parties. By article 25 each contracting State undertakes to ensure that all its national aircraft and aircraft flying above its territory shall comply with certain "Rules as to Lights and Signals and Rules for Air Traffic," which are now embodied in Schedule IV of the British Consolidated Order in Council.

Articles 26 to 29 inclusive relate to prohibitions of and restrictions upon the carriage of certain articles such as explosives, arms, munitions of war, and photographic apparatus.

Articles 30 to 33 inclusive deal with State aircraft, prohibiting the passage or landing of military aircraft over or upon the territory of another Contracting State

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[1] "Voies internationales" in the French text, "linee aeree" in the Italian. All the three languages are equally authentic. Upon the controversy, see Cacopardo, *op. cit.*, at p. 171.

[2] § 59.

without special authorization, requiring special arrangements for the admission of foreign police and customs aircraft, and granting to all other State aircraft, *e.g.* commercial aircraft, the status of private aircraft. Military aircraft which receive the special authorization above mentioned receive the privileges of foreign ships of war.

Article 34 constitutes the International Commission for Air Navigation, the seat of which is in Paris.[1]

Amongst the miscellaneous concluding provisions, there may be mentioned article 37 which refers to the Permanent Court of International Dispute any dispute between two or more States as to the interpretation of the Convention; article 38, whereby "in case of war, the provisions of the present Convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals"; article 40, whereby "the British Dominions and India shall be deemed to be States for the purpose of the present Convention," and the territories and nationals of protected and mandated territories are assimilated to those of the protecting and mandatory States. The Convention may be denounced upon one year's notice.

Annexes to the Convention deal with the Marking of Aircraft, Certificates of Airworthiness, Log Books, Rules as to Lights and Signals and Rules for Air Traffic, Minimum Qualifications for obtaining Certificates as Pilots and Navigators, International Aeronautical Maps and Ground Markings, Collection and Dissemination of Meteorological Information, and Customs.

§ 5. *British Legislation.*—Turning to British legislation, the Aerial Navigation Act, 1911, repealed by the Act of 1920, empowered a Secretary of State "for the purpose of protecting the public from danger" to prohibit the navigation of aircraft over any areas prescribed by him. The immediate cause of this Act was the apprehension that certain of the more air-minded of the King George's

[1] This International Union ("CINA") possesses many features of particular interest to the international lawyer: see Cacopardo, *op. cit.*, pp. 174–176, and the work by its secretary, *M. Albert Roper*, already referred to on p. 2. The address of the Commission is 15 bis, Rue Georges Bizet, Paris.

lieges would demonstrate their loyalty by following his Coronation Procession in aeroplanes. The Aerial Navigation Act, 1913, repealed by the Act of 1920, extended the purposes of this power of prescribing forbidden areas to include the defence or safety of the realm, and authorized firing at aircraft which failed to comply with regulations on being signalled to do so. In 1919 a professedly temporary statute, the Air Navigation Act, 1919, repealed by the Act of 1920, empowered a Secretary of State to make regulations regarding the licensing of pilots, aircraft and aerodromes, and generally regarding the carriage by air of passengers and goods; and the purposes of the Air Council were extended to include civil air navigation.

The object of the Air Navigation Act of 1920 was twofold, firstly

> " to make further provision for controlling and regulating the navigation of aircraft, whether British or foreign, within the limits of His Majesty's jurisdiction . . ., and, in the case of British aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere " ;

and, secondly, to enable effect to be given to the Convention of 1919. These objects it achieves by empowering His Majesty to make Orders in Council, of which there have been many, the principal one now in force being known as the " Consolidated Order " and dated December 19, 1923. In the course of this volume we shall have occasion to examine most of the sections of the Act and some of the provisions of the Orders in Council, though the latter deal mainly with technical aeronautical matters which are not our primary concern. There is, however, one section of the Act so vital to the question of liability for damage done by or from aircraft, which is one of the principal topics dealt with in this volume, that it is desirable to become familiar with it at once.

Section 9 represents an attempt by the legislature to put an end to the theoretical controversy on the question whether mere flight over the land of another constitutes trespass or nuisance or is legally innocuous, and to prescribe the conditions in which the owner of aircraft

can be held liable for damage done by or from his aircraft. In popular language, it imposes a compromise to the effect that no action for trespass or nuisance lies for mere flight at a reasonable height over the property of another, and on the other hand that, if any material loss or damage occurs, an absolute liability rests upon the owner of the aircraft to pay compensation, irrespectively of his fault. In precise language, the relevant part of section 9 [1] is as follows :

> " No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with ; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered : . . ."

In the light of these provisions of section 9, some justification for writing the next two chapters is required, and it is desirable to give it at once, although it involves a slight anticipation of the analysis of this section. The necessity of the ensuing examination of certain common law principles governing the user and ownership of the air space, trespass, nuisance and negligence, and strict liability for dangerous things is imposed by the fact that the statutory compromise of section 9 is not universal and exhaustive in its application. There are certain aircraft to which, and certain circumstances in which, it does not apply, so that in those cases we are thrown back upon common law principles. Moreover, a statute is but a palimpsest upon the common law, and the tenacity

—the undue tenacity—of the English legal practitioner and judge to the common law and their reluctance to admit that their beloved common law has been altered by the rude hand of the legislature would alone render necessary the course we are about to take.

§ 6. What then are the cases in which section 9 does not apply? They would seem to be as follows:

(i) the Act of 1920 does not apply to aircraft "belonging to or exclusively employed in the service of His Majesty" (section 18 (1));

(ii) when any one of the many provisions of the Act of 1920 or of any Order made thereunder or of the Convention of 1919 has not been complied with—a most formidable condition, as any one who peruses the Convention, the Act, and the voluminous Orders in Council will admit—the immunity from actions of trespass or nuisance "by reason only of the flight of aircraft over any property," etc., ceases to apply;

(iii) this immunity only applies when the flight takes place "at a height above the ground, which, having regard to wind, weather and all the circumstances of the case, is reasonable";

(iv) there may be other qualifications based upon the locality of the aircraft;

(v) the immunity does not apply to aircraft which do not possess the nationality of a State party to the Convention of 1919 or to a special Convention of the kind referred to in article 5 of the Convention of 1919 and which do not hold a special and temporary authorization under that article.

These limitations upon the effect of section 9 will be examined in due course.[1] Meanwhile the mere mention of them will suffice to demonstrate the impossibility of avoiding an examination of the common law principles lying behind the statute.

One reason, though not the principal reason, why section 9 was considered necessary was, so it seems to me, the adoption of the principle of a mutual right of

[1] See later, Chapter 4.

innocent passage for private aircraft by the Convention of 1919. Great Britain has *imperium* in its territory and the superincumbent air space, but the *dominium* in the territory is vested in a multitude of landowners. Without legislation it was at least possible that the owners and occupiers of land might have actions for trespass or nuisance against aviators in flight above their land, however reasonably conducted the flight might be. At any rate, there was the possibility of aviators being embarrassed by actions being brought against them. The Convention alone would be no defence to such actions if they should exist at common law, and therefore legislation was required to place the matter beyond doubt, though that was not one of the avowed objects of section 9.[1]

[1] Some discussion of the considerations underlying the Act of 1920 will be found in the Reports of the Civil Aerial Transport Committee, published in 1918 (Cmd. 9218); for an early draft of section 9, see p. 38 of that document.

# CHAPTER 2

## THE COMMON LAW AS TO OWNERSHIP AND USER OF THE AIR AND THE AIR SPACE. TRESPASS

§ 7. The tyranny of the maxim *cujus est solum, ejus est usque ad coelum et ad inferos*, in England, at any rate, seems to me to be attributable in part to the traditional respect which English lawyers, while rejecting the complete *corpus juris civilis*, habitually show to what they conceive to be a rule of Roman law when it happens to accord with their own ideas, and in part to the grandiloquent manner adopted by English lawyers, notably Coke and Blackstone, in exalting the extent and importance of property in land.

In the first place the maxim is not Roman. There are, however, a few passages of Roman law which may be quoted as having some relevance upon the user of the air space.[1]

(1) *The Twelve Tables.*—The text of the relevant passage has not survived, but according to Ulpian (*Digest*, XLIII. 27. 1, § 8):

> " Lex duodecim tabularum efficere voluit ut quindecim pedes altius rami arboris circumcidantur " ;

and, according to Pomponius (*Digest*, XLIII. 27. 2),

> " Si arbor ex vicini fundo vento inclinata in tuum fundum sit, ex lege duodecim tabularum de adimenda ea recte agere potes jus ei non esse ita arborem habere."

(2) *Institutes of Justinian*, II. 1. 1:

> " Et quidem naturali jure communia sunt omnium haec : aer et aqua profluens et mare et per hoc litora maris." [2]

[1] One of the best accounts of the matter, so Professor Buckland tells me, will be found in Bonfante, *Corso di Diritto Romano*, vol. 2. i, La Proprietà (1926), pp. 220–229. I am indebted to Professor Buckland for drawing my attention to some of the passages in the *Corpus Juris Civilis* and some of the glosses referred to in the following pages.

[2] See also Bracton, *De Legibus et Consuetudinibus Angliae*, Book I, ch. xii. (5): " Naturali vero jure communia sunt omnia haec, aqua profluens, aer et mare, et littora maris, quasi maris accessoria "—a borrowing which comes *via* Azo (see *Bracton and Azo*, by Maitland, Selden Society, vol. viii. p. 87).

*Aer* was, therefore, a *res communis*, and *res communes* or *res communes omnium*, as they are sometimes called, form one of the divisions of *res extra commercium*, that is, things incapable of private ownership.[1]

(3) *Digest*, VIII. 2. 1 pr. :

" Si intercedat solum publicum vel via publica, neque itineris actusve neque altius tollendi servitutes impedit ; sed immittendi protegendi prohibendi, item fluminum et stillicidiorum servitutem impedit ; quia coelum, quod supra id solum intercedit, liberum esse debet."

(4) *Digest*, VIII. 2. 24 :

" Cujus aedificium jure superius est, ejus[2] est in infinito supra suum aedificium imponere : dum inferiora aedificia non graviore servitute oneret, quam pati debent."

(5) *Digest*, XLIII. 24. 21. 2.

" In opere novo, tam soli quam coeli mensura facienda est."

(6) *Digest*, XLIII. 24. 22. 4 :

" Si quis projectum aut stillicidium in sepulchrum immiserit, etiamsi ipsum monumentum non tangeret, recte cum eo agi, quod in sepulchro vi aut clam factum sit, quia sepulchri sit non solum is locus, qui recipiat humationem, sed omne etiam supra id coelum : eoque nomine etiam sepulchri violati agi posse."

Goudy[3] inclines to the opinion that in Roman law

" the right of property in the *coelum* would have sufficed to prevent air-transit over a man's ground and interdicts to prevent it would have been granted had damage been caused or threatened. The assertion of some recent writers that because the air, like the sea, is *res communis* and free to all, the circulation of air-craft would not have been prevented by Roman law is, to my mind, based on the erroneous assumption " [that *aer* and *coelum* meant the same thing]. " It was the *aër*—the omnipresent medium, never at rest and incapable of appropriation—that was *res communis*. It was so because necessary for the life and health of all. But in contrast with it the *coelum* was *res soli* and capable more or less of

[1] See comments by Mukerjea, pp. 60–61.
[2] Or "ei jus."
[3] *Two Ancient Bro cards* in *Essays in Legal History* (Oxford University Press, 1913), p. 231.

appropriation by the owner of the soil. In this sense it was not so much *aër* as *spatium* (or *regio*) *aëris*, and it is only in this sense that it can be understood in the two passages above cited.[1] The common use of *aër* is indeed asserted by many passages in the Digest, but private ownership of the *coelum* is also asserted. There is no inconsistency."

§ 8. It is, however, not until much later than the time of Justinian that the maxim crystallizes out. It is believed, subject to what follows as to Jewish law, that the maxim has not yet been traced to a source earlier than the *Glossa Ordinaria* upon the *Corpus Juris* which was completed by the Bolognese glossator Accursius.[2] That is not equivalent to saying that of a certainty Accursius was the " true and first inventor " of the maxim, because the *Glossa* was a composite document. But it is said[3] that by the time Accursius had attained the age of forty-three or forty-four he had produced a round hundred thousand glosses, and our maxim may very well have been among them. The passage in the Digest upon which the gloss is made is the one quoted from *Digest*, VIII. 2. 1 pr., and the gloss upon the word *coelum* is :

" *Nota.—cujus est solum, ejus debet esse usque ad coelum.*"

To the word *coelum* in the gloss is appended in some editions of the Digest yet a later gloss :

" *cujus solum ejus coelum.*"

Four other glosses deserve mention. Upon *Digest*, VIII. 2. 8, there is a gloss :

" Si habeo domum, possum eam exaltare usque ad coelum, si non debeo alii servitutem."

Upon *Digest*, XLIII. 24. 21. 2[4] (quoted above) there is a gloss :

" quia coelum quod supra aedes meas est usque ad coelum liberum esse debet."

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[1] Namely, the passages (3) and (6) cited above from the Digest. For some references to Roman Law, see also de Montmorency in *Transactions of Grotius Society*, vol. iii. (1918), pp. 61–69.

[2] It is said that this fact was first pointed out by Guibé, *Essai sur la navigation aérienne en droit interne et en droit international* (Paris, 1912).

[3] For an interesting biographical note upon Accursius by Professor de Zulueta, see *L.Q.R.*, xlvi. (1930), pp. 148–150.

[4] XLIII. 24. 20 in some glossed editions.

Upon *Codex*, III. 34. 8, there are two glosses :

" quod omnis domus praesumitur libera a fundamentis usque ad coelum, nisi probetur servitus constituta vel praescripta," and

" videtur ergo quod quodlibet praedium praesumitur liberum, nisi probetur contrarium, est enim ejus usque ad coelum, cujus est solum."

Another possible source of the maxim has been suggested in a note in the *Law Quarterly Review* in January, 1931.[1] It appears that in a starr or Jewish contract, dated in 1285, relating to the sale of a house in Norwich, made before a number of Norwich city officials, and evidently intended to operate under Jewish law, the parties in defining the rights of an owner used the expression " to the heights of the heavens and to the depths of the earth." As a phrase used in Jewish law, and used to define ownership, it has been traced back as far as a certain Rabbi Akiba, who died about 70 A.D., and it is said that Deuteronomy xxx. 11–14, and Isaiah vii. 11, contain references to it. Having regard to the facts (1) that Accursius did not cite or coin the maxim in connection with the definition of ownership, but in relation to circumstances preventing the acquisition of certain servitudes, and (2) that later in English law the maxim was to be used to describe the extent of ownership, the particular context in which the Jewish phrase is used is certainly a matter of interest.

§ 9. How, and precisely when, the maxim effected its entry into English legal thought and literature I am, without a longer search than I have at present the time to make, unable to say. The first mention of it known to me occurs in the case of *Bury* v. *Pope*,[2] in 1586, a case of obstruction of light, in which it was held (at a time when it seems that a claim to a right of light based on prescription would be defeated by proof of commencement of enjoyment within the time of legal memory) that a man had a right to build on his own land in such a manner as to obstruct the lights of his neighbour's

[1] XLVII. (1931), pp. 14–16.
[2] Cro. Eliz. 118.

house which had been in existence for " thirty or forty years." At the end of the report we find :

" *Nota.—Cujus est solum, ejus est summitas usque ad coelum. Temp. Ed. I.*"

Whether the maxim was cited as part of the judgment or was added by the reporter is not clear. So far I have been unable to discover the source " Temp. Ed. I." to which the reporter is referring or to shed any light upon the dark interval.[1]

In English law there does not appear to have been any systematic attempt by judges or writers to think out the legal position of the air and the air space, and any one who seeks to make this attempt now that it has become of immediate importance to do so is driven to search for scraps in many different fields—in the law as to the *quantum* involved in the ownership of land, as to the conditions of the actions of trespass and of nuisance, as to the right to light and the other amenities of property in land, and so forth. Across his path is continually cast the pale shadow of the *cujus est solum* maxim,[2] which, like most maxims and slogans, has merely been used either to darken counsel or to afford a short cut and an excuse for not thinking the matter out upon a basis of principle.

We propose, therefore, in the first place, to examine some of the principal cases and texts in which this maxim has been cited, for there is no doubt that it has exerted a very considerable influence upon the development of the common law.[3]

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[1] It is worth mentioning that Franciscus, the son of Accursius, also a teacher of law, appears to have come to England in 1274 upon the invitation of Edward I, who met him at Bologna on his way home from the Holy Land. He was employed by Edward on various pieces of public business, and seems to have left England, having secured a pension, in 1281. See Selden, *Ad Fletam Dissertatio*, VIII (11) (Ogg's edition, 1925), p. 145; Spence, *Equitable Jurisdiction* (1846), vol. i. p. 131; Scrutton, *Roman Law in England* (1885), p. 71. Maxims are quoted in the early Year Books and even earlier, *e.g.* by Glanville, but I have not yet been able to find our maxim in English law earlier than 1586.

[2] See Holdsworth, *History of English Law*, vol. vii. (1925), p. 485.

[3] Amongst other discussions of the place of the maxim in private law in the light of the question of the air may be mentioned Kuhn in *American Journal of International Law*, vol. iv. (1910), pp. 122–128; Hazeltine, pp. 54–94; Spaight, p. 54; Mukerjea, pp. 200–243; Zollmann, pp. 1–29.

It is convenient to begin with extracts from two classic text-books. Coke says : [1]

> " And lastly, the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and all other things even up to heaven ; for *cujus est solum, ejus est usque ad coelum*, as is holden 14 H. 8. fo. 12 ; 22 Hen. 6. 59 ; 10 E. 4. 14. *Registrum origin.* and in other bookes."

Blackstone,[2] a faithful follower of Coke, after pointing out that water is " a species of land," and that an action to recover a pool or other piece of water must take the form of an action to recover " land covered with water," [3] because " water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary, property therein," continues :

> " Land hath also, in its legal signification, an indefinite extent upwards as well as downwards. *Cujus est solum, ejus est usque ad coelum*, is the maxim of the law, upwards ; therefore no man may erect any building, or the like, to overhang another's land . . . So that the word ' land ' is not only the face of the earth, but every thing under it, or over it."

§ 10. *Cases on Structural Projections.*—In *Baten's Case* [4] in 1610 an overhanging portion of a house was treated as in itself a nuisance, and the plaintiffs were not required to prove actual damage :

> " For in this case the defendant has built a new house, which overhangs part of the plaintiff's house (which was not in any of the other cases), so that of necessity the rain which falls from the new house must fall upon the plaintiff's house. And

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[1] Co. Litt. 4a. Holdsworth, *op. cit.*, points out that Coke's references to the Year Books are incorrect. (i) The citation " 14 H. 8. fo. 12," which to me is meaningless, is, I think, a mistake for 14 H. 8, Mich. pl. 1, a case of trespass *quare clausum fregit* brought by the Bishop of London for breaking his close and taking " herons and shovelers " which built their nests in the trees in a park leased by him to the defendant. In it " Brook Justice " (apparently Richard Brooke, a Judge of the Court of Common Pleas) is reported to have said : " le lessour aura le terre sur que l'arbre cressoit, car l'arbre ad son estre per le terre et per l'aire, et donques tout le terre sur que il cressoit in profundite, et tout l'aire que luy nurrish en altitude, perteigne a cesty a que l'arbre perteigne. . . ." This case is discussed in *Blades* v. *Higgs* (1865) 20 C. B. (N.S.) 213. (ii) " 22 Hen. 6. 59 " is apparently the case of goshawks, number 11 in Trinity Term.

[2] *Commentaries*, vol. ii. ch. 2, p. 18.

[3] *Challenor* v. *Thomas* (1609) 1 Brownl. 142.

[4] 9 Rep. 53 b.

*cujus est solum, ejus est usque ad coelum.* And therewith agrees 13 H. 8. 1,[1] and by the overbuilding upon part of the house of the plaintiffs, he has deprived them of the air; also he has prevented them from building their house higher."

*Pickering* v. *Rudd*[2] in 1815 was an action for trespass *quare clausum fregit* in which it was alleged that the defendant had committed trespass by nailing upon his house a board which projected several inches from the wall and so far overhung the plaintiff's garden, and also by cutting down the plaintiff's virginia creeper. The plaintiff's counsel in reliance upon *cujus est solum*, etc., expressly claimed ownership of the air space by arguing that "the space over the soil of the garden is the plaintiff's, like the minerals below, and an invasion of either is in contemplation of law, a breaking of the close." Lord Chief Justice Ellenborough rejected this contention and gave judgment for the defendant. His judgment is short and, in the paucity of existing authority, may be quoted in full:

"I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule upon the circuit, that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it. A very learned Judge, who went the circuit with me, at first doubted the decision, but I believe he afterwards approved of it, and that it met with the general concurrence of those to whom it was mentioned. But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage. Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded. If any damage arises from the object which overhangs the close, the remedy is by an action on the case. Here the verdict depends upon the new assignment of excess in cutting down the tree."

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[1] In Trinity Term.
[2] (1815) 4 Camp. 219; 1 Stark. 56; 16 R. R. 777.

Notice the penultimate sentence. The conclusion to be drawn from the case is that in such circumstances trespass will not lie; if, however, the object which invaded the air space causes actual damage, the remedy is an action on the case, presumably nuisance. It is noticeable that, so far as appears from both Campbell's and Starkie's reports, no cases were cited by counsel or by the learned judge. It turned out that the board objected to did not in fact project beyond the wall of the defendant's house, so that the learned judge's remarks are really *obiter*, and on the question of damage to the creeper it seems that the jury found that the defendant had caused no damage in cutting it down.

The two reports, Campbell's and Starkie's, deserve comparison. In the latter the Lord Chief Justice is reported to have said: [1]

> "But I never yet heard that firing *in vacuo* [2] could be considered as a trespass. No doubt, if you could prove any inconvenience to have been sustained, an action might have been maintained; but it may be questionable whether an action on the case would not be the proper form. Would trespass lie for passing through the air in a balloon over the land of another?" [3]

*Fay* v. *Prentice*,[4] in the year 1845, was an action on the case to recover for the damage caused by a cornice built by the defendant upon his house which projected over the plaintiff's garden and damaged it by overhanging it and by shooting rain on to it. The defendant unsuccessfully contended that, inasmuch as there was no actual evidence of damage by rain, the plaintiff ought to have sued in trespass and not in case, and, no damage having been proved, could not recover in case. The Court of Common Pleas held that "the bare existence

[1] At p. 58.

[2] In *Kenyon* v. *Hart* (1865) 6 B. and S. 251, there is a suggestion that Blackburn, J., considered that the act of shooting a pheasant when it is above, and so that it falls upon, the land of another amounts to a trespass.

[3] In *Kenyon* v. *Hart*, *supra*, at p. 252, Blackburn, J., remarked that he understood the good sense of Lord Ellenborough's doubt on this point, "though not the legal reason for it." In an Indian case, *Bagram* v. *Khettranath Karformah* (1869) 3 Bengal Law Reports (Original Jurisdiction, Civil) 14 (a case relating to rights to light and air), Norman, J., at p. 43, said: "No man has any absolute property in the open space above his land. To interfere with the column of air superincumbent over such land, is not a trespass."

[4] (1845) 14 L. J. C. P. 298.

of the projection " was a nuisance whether or not rain had fallen, and that the law would infer damage; accordingly, it upheld the verdict in favour of the plaintiff for £40 damages.[1] Coltman and Maule, JJ., both comment upon the *cujus est solum* maxim; Coltman, J., regards it as " a mere presumption," and Maule, J., says that " it is by no means the presumption of law that this exists in all cases; there are many instances in which the maxim would not apply; for example, in the case of chambers in the Inns of Court, it would not be true."

In *Corbett* v. *Hill*,[2] a complicated case which it is a little difficult to understand without the aid of an architectural plan, the parties were owners of two houses which not merely were contiguous, but were inter-dependent and overlapped in several places. The plaintiff had conveyed the defendants' house to them, and in the course of demolishing the house with a view to rebuilding it was discovered that a room of the plaintiff's house protruded into the defendants' house. The defendants proposed to rebuild over the roof of this protruding room and the plaintiff sought to restrain them by injunction, claiming the column of air *usque ad coelum* over his projecting room. He failed on the ground that on the facts all that he owned in connection with his projecting room was " such a portion only . . . carved out of the freehold as is included between the ceiling of the room at the top and the floor at the bottom." Subject to that protrusion, said Sir W. M. James, V.-C., the defendants

> " still remain owners of everything else, including the column of air above the room upon which the supposed trespass has been made." . . . " The ordinary rule of law is, that whoever has got the *solum*—whoever has got the site—is the owner of everything up to the sky and down to the centre of the earth. But that ordinary presumption of law, no doubt, is frequently rebutted, particularly with regard to property in towns . . ."

In this case the rebutting fact seems to have been that the plaintiff had conveyed to the defendant the column of

[1] It is not surprising to find English judges accepting counsel's invitation to take " judicial notice that rain falls from time to time."

[2] (1870) L. R. 9 Eq. 671. See also *Betts* v. *Pickfords* [1906] 2 Ch. 87.

air superincumbent upon his protruding room or, more correctly perhaps, the whole column of air above the *solum* conveyed to them minus the portion occupied by his protruding room.[1]

In *Gifford* v. *Dent* [2] both parties appear to have been tenants, the plaintiffs of a shop on the ground floor and of a basement which projected under a kind of forecourt between the wall of the house and the pavement, and the defendant of a front room on the second floor. The defendant attached to his wall an illuminated sign 20 feet high and projecting 4 feet 8 inches from the wall over the forecourt. The plaintiffs claimed an injunction and damages for trespass. The only report of the decision is meagre. Romer, J., found for the plaintiffs on two grounds, firstly, that the defendant was bound by a covenant not to attach to his premises any advertisements not previously approved by the landlord; this sign had not been approved and the plaintiffs were presumably entitled to enforce the covenant; secondly, that the plaintiffs as tenants of the forecourt above their basement were " tenants of the space above the forecourt *usque ad coelum*," so that " the projection was clearly a trespass upon the property of the plaintiffs." To the argument of the defendant's counsel that the defendant must have a right to put his head out of the window, the learned judge admitted that this was so, for the reason that it was " perhaps a necessary concomitant of his tenancy." This concession of a reasonable use of the air space should be noted; the brevity of its duration would not alone render it innocuous; [3] it is its reasonableness that matters.

§ 11. *Overhanging Branches.*—It is well established that the fact that the branches of my tree overhang your

[1] On the question of horizontal hereditaments and the right of support by the subjacent land or building, see *Humphries* v. *Brogden* (1850) 12 Q. B. 739, and Gale on *Easements* (10th ed. 1925), ch. vi.

[2] [1926] W. N. 336; 71 S. J. 83. For the comment of a Scots lawyer upon this case, see *L.Q.R.*, xliii. (1927), p. 318. Apparently in Scotland this case would have been decided differently, the *usque ad coelum* maxim being qualified by the rights conferred upon the owner of an upper flat by the law of tenement.

[3] See Ellenborough, L.C.J., in *Pickering* v. *Rudd* (*supra*): " Whether the action may be maintained cannot depend upon the length of time for which the superincumbent air is invaded." As Camden, L.C.J., said in *Entick* v. *Carrington* (1765) 19 State Trials at p. 1066: " Every invasion of private property, be it ever so minute, is a trespass."

land does not constitute a trespass.[1] It is equally well established that this fact constitutes a nuisance, but it seems that an action for the nuisance will only lie if actual damage can be shown to have resulted.[2] If it has not, the remedy is to abate the nuisance.[3]

*Trespassing Animals.—Ellis* v. *Loftus Iron Co.*[4] was a case where the defendants' horse injured the plaintiff's mare by biting and kicking it, the mare remaining on and within the plaintiff's field and the horse biting and kicking her through a wire fencing. The Court of Common Pleas on appeal from the County Court held that the defendants were liable in trespass, negligence or no negligence.

> " It seems to me sufficiently clear " (said Lord Coleridge, C.J.), " that some portion of the defendants' horse's body must have been over the boundary. That may be a very small trespass, but it is a trespass in law." Keating, J., said : " The horse, it is found, kicked and bit the mare through the fence. I take it that the meaning of that must be that the horse's mouth and feet protruded through the fence over the plaintiff's land, and that would in my opinion amount in law to a trespass."

§ 12. *Cases on Telegraph, Telephone, and other Wires.*— When the telegraph, and later the telephone,[5] were introduced, the law was confronted with a problem not unlike the problem presented by aerial navigation. On the one hand stood the sacred rights of property ; on the other hand the desire to make use of the air in the interests of the community. The physical conditions of the use involved in aerial navigation differ substantially, as we shall see, but it is interesting to note the law with regard to telegraph and telephone wires. Both the legislation and the relevant decisions are firmly based

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[1] *Per* Kay, L.J., in *Lemmon* v. *Webb* [1894] 3 Ch. at p. 24 : " the encroachment of the boughs and roots over and within the land of the adjoining owner is not a trespass or occupation of that land which by lapse of time could become a right. It is a nuisance."

[2] *Smith* v. *Giddy* [1904] 2 K. B. 448. See Salmond, pp. 223 and 237.

[3] Which may be done without notice if it is unnecessary to enter upon the other party's land : *Lemmon* v. *Webb* [1895] A. C. 1.

[4] (1874) 10 C. P. 10. Denman, J., at p. 14 cites the maxim.

[5] Which was held to be a " telegraph " within the meaning of the Telegraph Acts : *Attorney-General* v. *Edison Telephone Co. of London* (1880) 6 Q. B. D. 244.

on the principle that the owner of the *solum* owns the column of air superincumbent upon it, at any rate up to a height which includes that at which telegraph and telephone wires are fixed.

In *Wandsworth Board of Works* v. *United Telephone Co.*[1] in 1884, a strong court of appeal (Brett, M.R., Bowen and Fry, L.JJ.) held that a telephone wire passing across the High Street of Putney at a height of thirty feet constituted no trespass upon the plaintiff's property because all that was vested in them by the legislature under the description of a " street " was " a proprietary right in the area of ordinary user " as a street, and the wire as fixed was outside that area ; but no member of the court doubted that the wire would have amounted to a trespass against an ordinary proprietor of land. Fry, L.J., said :[2] " as at present advised, I entertain no doubt that an ordinary proprietor of land can cut and remove a wire placed at any height above his freehold." [3]

In this case Bowen, L.J., inclined to rehabilitate the maxim and said :[4]

> " If the board of works were in the position of simple owners of land, or if land had been vested in them by an ordinary conveyance, I should be extremely loth myself to suggest, or to acquiesce in any suggestion, that an owner of the land had not the right to object to anybody putting anything over his land at any height in the sky. It seems to me that it is not necessary to decide upon what exact legal fiction, or on the existence of what legal theory one is to justify the principle which I think is embodied in the law, as far as I have been able to see, that the man who has land has everything above it, or is entitled at all events to object to anything else being put over it."

This decision was followed by the Court of Appeal in *Finchley Electric Light Co.* v. *Finchley Urban District*

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[1] (1884) 13 Q. B. D. 904.

[2] At p. 927.

[3] Brett, M.R., declined to measure the height of the ordinary user of a street. There was some talk about fire-escapes, but he preferred to take as the test " the ordinary height of things which use the street as a street " (at p. 916). See also *Andrews* v. *Abertillery Urban Council* [1911] 2 Ch. 398, where the Court of Appeal held that two electric light standards which were either twenty-three or twenty-eight feet high did not exceed the limits of the ordinary area of user ; they did not " go beyond the stratum of air which passed to the urban district council " under a certain conveyance.

[4] At p. 919.

*Council*,[1] where the offending wires crossed the defendants' street at a height of thirty-four feet and fulfilled the object of supplying electricity to one of the plaintiffs' customers, and an unsuccessful attempt was made to distinguish the earlier case by alleging that the defendants having succeeded to turnpike trustees had acquired the complete fee simple and not merely a proprietary right in the ordinary area of user as a street.

There is another aspect of the telegraph and telephone wire cases which requires brief consideration. Can a company owning these wires be said to be in "occupation" of the air through which they pass? The test of rateability is occupation. Clearly such a company is in occupation of the posts supporting its overhead wires and the roofs, chimneys and walls to which those wires may be attached. But is it in occupation of the air space through which these wires pass? In *Electric Telegraph Co.* v. *Overseers of Salford*[2] in 1855 this question was answered by the Court of Exchequer in the affirmative. As Baron Martin said, "the simple question is, whether the facts stated show that the company has the exclusive occupation of what the law calls land."[3] He then quotes the passage in Coke upon Littleton, cited above and containing the *cujus est solum* maxim, and concludes that the company has "the exclusive occupation, by their posts and wires, of that which the law calls land." Baron Alderson, in coming to the same conclusion, founded his judgment upon an earlier case relating to reservoirs containing water and aqueducts and pipes for conveying it, and said:[4]

> "There is no reasonable distinction between the electric fluid passing through pipes in the air, under water, or in the soil. All the surface upwards and downwards is land."

The judgment of the Court of Appeal in *Lancashire Telephone Co.* v. *Overseers of Manchester*,[5] in 1884, adds

[1] [1903] 1 Ch. 437.
[2] 11 Exch. 181.
[3] At p. 188. For this and the next case cited I am indebted to Lycklama a Nijeholt in *Revue juridique internationale de la locomotion aérienne*, vol. i. (1910), at p. 275.
[4] At p. 187.
[5] (1884) 14 Q. B. D. 267.

nothing to the earlier decision for our purposes; here, too, the assessment upheld was made in respect of the wires as well as of the posts and standards supporting them. These decisions are regarded as good law to-day. I think, therefore, that we can say that the common law recognizes that the air space is susceptible of occupation. Occupation involves *corpus* as well as *animus*, and the proximity of the air space to the surface in these rating cases removes any difficulty as to the effectiveness of the possession.

§ 13. *Shooting Across the Land of Another.—Clifton* v. *Viscount Bury* in 1887 is stated in the report [1] to be an action for an injunction and to recover "damages for injury caused by" rifle-shooting by the defendants, the commanding officer and another officer of a Volunteer regiment, across the plaintiff's land. As regards a 600 yards range there was no difficulty. "Splashes and fragments of bullets" which fell constantly on the plaintiff's land so as to interfere materially with his ordinary use and enjoyment of his farm "constituted a series of trespasses of an actionable character." The case of the use of the 1,000 yards range was not so simple. The normal trajectory of the bullets when passing across the plaintiff's farm would be 75 feet, and there was no evidence that bullets fired at this range had ever fallen on the farm. But the shooting was "not unattended with risk" and "would cause a not unreasonable alarm which rendered the occupation of that part of the farm less enjoyable than the plaintiff was entitled to have it." Hawkins, J., was satisfied, therefore, that the plaintiff had "a legal grievance sufficient to enable him to maintain an action." He is reported to have said that

> "as regards the complaint that when the 1,000 yards range was used the bullets traversed the land of the plaintiff, he did not look upon the ground of complaint as constituting a trespass in the strict technical sense of the term; but he did look upon such firing of bullets as grievances which, under the circumstances, afforded the plaintiff a legal cause of action."

[1] 4 T. L. R. 8.

He then referred to *Pickering* v. *Rudd* and *Kenyon* v. *Hart*, *supra*, and granted an injunction "to prevent the future use of the 1,000 yards range in such manner as to cause bullets fired along it to traverse the land of the plaintiff."

The judgment itself, or perhaps the report of it, is not as clear as might have been desired, but I think we are justified in concluding that as regards bullets fired along the 1,000 yards range the cause of action was nuisance, and that trespass was definitely negatived.[1]

§ 14. *Modern Text-books.*—A very few modern text-books may be quoted.

Sir Frederick Pollock in his *Law of Torts*[2] has a passage on *Aerial Trespass* to the following effect:

> "It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in aircraft, or to cause a material object, as shot fired from a gun, to pass over it. Lord Ellenborough thought it was not in itself a trespass 'to interfere with the column of air superincumbent on the close,' and that the remedy would be by action on the case for any actual damage: though he had no difficulty in holding that a man is a trespasser who fires a gun on his own land so that the shot fall on his neighbour's land.[3] Fifty years later Lord Blackburn inclined to think differently,[4] and his opinion seems the better. Clearly there can be a wrongful entry on land below the surface, as by mining, and in fact this kind of trespass is rather prominent in our modern books. It does not seem possible on the principles of the common law to assign any reason why an entry above the surface should not also be a trespass, unless indeed it can be said that the scope of possible trespass is limited by that of possible effective possession, which might be the most reasonable rule.... At common law it would clearly be a trespass to fly over another man's land at a level within the height of ordinary buildings, and it might be a nuisance to hover over the land even at a greater height. As regards shooting, it would be strange if we could object to shots being fired point-

[1] In an American case, *Portsmouth Harbour Land and Hotel Co.* v. *United States* (1922) 260 U. S. 327, the effect of artillery shooting across private land came under consideration from a different point of view. For a case arising out of damage done to a house by a bomb from an enemy aeroplane, see *Redmond* v. *Dainton* [1920] 2 K. B. 256.

[2] 13th ed. (1929), p. 361.

[3] *Pickering* v. *Rudd*, *supra*.

[4] *Kenyon* v. *Hart*, *supra*.

blank across our land only in the event of actual injury being caused; but the projectiles of modern artillery, when fired for extreme range, attain in the course of their trajectory an altitude exceeding that of Mont Blanc or even Elbruz, and it seems doubtful whether the passage of a projectile at such a height could in itself be a trespass."

The late Sir John Salmond,[1] in discussing Trespass above the surface, cites the *cujus est solum* maxim, and remarks: "This is doubtless true to this extent, that the owner of the land has the right to use for his own purposes, to the exclusion of all other persons, the space above it *ad infinitum*." He then shows that the owner of the land may cut overhanging branches of his neighbour's trees or electric wires stretched across his land, whether they cause him any damage or inconvenience or not. The remainder of this section until he comes to the Air Navigation Act, 1920, must be quoted in full:

"It does not follow from this, however, that an entry above the surface is in itself an actionable trespass; nor is there any sufficient authority that this is so. Such an extension of the rights of a landowner would be an unreasonable restriction of the right of the public to the use of the atmospheric space above the earth's surface. It would make it an actionable wrong to fly a kite, or send a message by a carrier pigeon, or ascend in an aeroplane, or fire artillery, even in cases where no actual or probable damage, danger, or inconvenience could be proved by the subjacent landowners. The state of the authorities is such that it is impossible to say with any confidence what the law on this point really is. It is submitted, however, that there can be no trespass without some physical contact with the land (including, of course, buildings, trees, and other things attached to the soil), and that a mere entry into the air space above the land is not an actionable wrong unless it causes some harm, danger, or inconvenience to the occupier of the surface. When any such harm, danger, or inconvenience does exist, there is a cause of action in the nature of a nuisance."

In the *Digest of English Civil Law*[2] we are told in § 811 that:

"Trespass to land is any unauthorised interference, however

[1] *Op. cit.*, p. 237.
[2] Edited by Edward Jenks (2nd ed., 2 vols. 1921); this title is by Sir J. C. Miles.

slight, by means of a voluntary act, with the possession of land; whether such interference is or is not intentional."

Another section, § 812, entitled "Extent of Possession," states that

"An action of Trespass lies for interference with the possession of the sub-soil or minerals beneath the surface of land, or of the air space incumbent thereon; but (*semble*) this right, for the purpose of suing in Trespass, is limited to so much of the air space above as the plaintiff can show to have been in his effective control."

thus adopting the view of Sir Frederick Pollock quoted above.

In Halsbury's *Laws of England*, in the title upon *Real Property and Chattels Real*,[1] the learned author (J. M. Lightwood), writing in 1912, after quoting the *cujus est solum* maxim, expresses the opinion that

"the strict right of property does not extend skyward without limit so as to entitle the owner to sue in trespass (*Pickering* v. *Rudd* (1815), 4 Camp. 219), and the advent of airships has shown that this would be impracticable. The extent of the right of ownership seems to be limited by the power of control —that is, ownership cannot extend beyond possible possession; and probably the ownership is limited to the air space required for the erection of buildings; see 56 Sol. Jo., p. 730."

But in the title on *Boundaries, Fences and Party Walls*,[2] we are told that

"the surface boundary [of land] probably carries with it the right to the column of air over the land up to the sky, and certainly the soil to the centre of the earth, on the principle *cujus est solum, ejus est usque ad coelum et ad inferos*."

§ 15. *Public Policy and Convenience.*—I feel bound to mention one matter. In endeavouring to state the attitude of the common law to a new development such as the use of the air for purposes of transport, we cannot

[1] Vol. xxiv. § 305, note (*f*). See also *ibid.*, vol. xxvii. § 1492, note (*e*).

[2] Vol. iii. § 213. The definition section (205) of the Law of Property Act, 1925, in sub-section ix, states that "land" includes "land of any tenure, and mines and minerals, whether or not held apart from the surface, buildings or parts of buildings (whether the division is horizontal, vertical or made in any other way) and other corporeal hereditaments." It contains no mention of anything above the surface of the land.

exclude all considerations of the public convenience. I am almost ashamed to quote the profound, though now much hackneyed, truth stated by Mr. Justice Holmes : [1]

> " The life of the law has not been logic : it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics."

It is arguable that the proper place for such considerations to receive effect is in the legislature, but neither in England nor in the United States of America have the judges thought it to be consistent with their duties to shelve responsibility for giving effect to public policy and convenience by pointing to the legislature. The maxims *salus populi est suprema lex* [2] and *argumentum ab inconvenienti plurimum valet in lege* [3] recognize the relevance of these considerations, as do the very many decisions in which effect has been given to them.[4] I feel certain that an English judge who was called upon to-day to deliver an opinion upon the ownership and user of the air or the air space would not—and rightly would not—exclude from his mind or consideration of the consequences of his decision upon aviation and its development.[5] I shall only quote one example of the robust common sense which is so frequently shown by the common law and its guardians, in this case Baron

[1] *The Common Law*, p. 1. For another exponent of similar views, see Cardozo, *Nature of the Judicial Process*. See also Salmond, at p. 29. " By running trains at the rate of fifty miles an hour, railway companies have caused many fatal accidents which could quite easily have been avoided by running at ten miles an hour. But this additional safety would be attained at too great a cost of public convenience, and, therefore, in neglecting this precaution, the companies do not fall below the standard of reasonable care and are not guilty of negligence (*Ford* v. *L. & S.W. Ry. Co.* (1862) 2 F. & F. 730."

[2] See Broom, *Legal Maxims*, 9th ed., 1924, p. 1.

[3] *Ibid.*, p. 127.

[4] For a valuable survey, see Winfield in *Harvard Law Review*, xlii. (1928), pp. 76–102.

[5] Over a hundred years ago Lord Ellenborough in *Pickering* v. *Rudd*, *supra*, was subject to a similar influence.

Parke. In an action on the case—for nuisance, as I understand it—to recover damage for diversion of water in a stream this distinguished judge made some interesting remarks [1] upon the reasonable use of the elements of nature. After holding that in the case before him the diminution of water was not perceptible, and the defendant's use of it a reasonable one, he continued: [2]

> " The same law will be found to be applicable to the corresponding rights of air and light. These also are bestowed by Providence for the common benefit of man. So long as the reasonable use by one man does not do actual perceptible damage to the right of another to the similar use of it, no action would lie. A man cannot occupy a dwelling-house and consume fuel in it for domestic purposes without, in some degree, impairing the natural purity of the air. He cannot erect a building or plant a tree near the house of another without, in some degree, diminishing the quality of light he enjoys; but such small interruptions give no right of action, for they are necessarily incident to the common enjoyment by all."

The learned judge was speaking, not of acts which *prima facie* amount to a trespass, but of those which might amount to a nuisance. His remarks are full of the most commendable common sense.

§ 16. *The aspect of trespass.*—I submit that there is nothing in the authorities considered in this chapter to justify us in concluding that the *passage* through the air of a vehicle or a projectile at a height and in such circumstances as to noise, smell, etc., as to involve no interference with the reasonable use of the subjacent land and structures upon it and no contact with them amounts to the tort of trespass.[3] *Ellis* v. *Loftus Iron Co.*[4] is no

[1] *Embrey* v. *Owen* (1851) 20 L. J. Ex. 212. The whole of this judgment repays study. The analogy between the use of flowing water and the use of the air is not remote, though the first is now governed by a well-developed set of principles.

[2] At p. 217.

[3] For an American case of trespass successfully brought against a balloonist who descended in a garden in New York City and attracted a crowd of spectators into the garden, see *Guille* v. *Swan* (1822) 19 Johns. 381; Zollmann, *Cases*, p. 90, and Dickinson, *Cases and Readings on the Law of Nations* (1929), p. 378. For Sir Frederick Pollock's comment on this case, see his *Law of Torts* (13th ed. 1929), p. 40. For a similar Scottish case against a parachutist for " nuisance " and " fault or negligence," see *Scott's Trustees* v. *Moss* (1889) 17 S. C. (Fourth Series) 32.

[4] (1874) 10 C. P. 10.

authority against this, as the protrusion of the trespassing horse's mouth and feet occurred within a few feet of the surface of the land and well within that portion of the air space which is ordinarily used by the owner of the surface. It is true, of course, that trespass to land is the breach of an absolute right, and no actual damage need be proved. A dictum such as that of Lord Chief Justice Camden in *Entick* v. *Carrington*,[1] to the effect that " every invasion of private property, be it ever so minute, is a trespass " enshrines in a somewhat arresting and epigrammatic form a valuable principle of individual freedom, but it must be understood *secundum quid* and cannot be construed as if it occurred in an Act of Parliament. There is a certain *epieikeia* or " sweet reasonableness " in the law which constantly saves it from the ludicrous consequences which strict logic would entail, as Mr. Justice Holmes has pointed out. This reasonableness is perhaps more apparent in the case of trespass to the person or battery ; " such touching, pushing, or the like as belongs to the ordinary conduct of life, and is free from the use of unnecessary force, is neither an offence nor a wrong." [2] " If two or more meet in a narrow passage, and without any violence or design of harm the one touches the other gently, it will be no battery." [3] I am not suggesting that trespass to the person is in English law " on all fours " with trespass to land, but the illustration is relevant to show the way in which the reasonableness of judges strives to avoid absurdities. The maxim *de minimis non curat lex* is perhaps dangerous to cite in connection with a question of absolute right. Its relevance in a case of nuisance is admirably illustrated by the judgment of Baron Parke in *Embrey* v. *Owen* referred to above, and it is difficult to believe that the same reasoning, equally based on the public convenience, would be irrelevant in an action for trespass to land in which there was no actual damage, no actual contact with the tangible property of the

[1] (1765) 19 State Trials at p. 1066.
[2] Pollock, *op. cit.*, at p. 221.
[3] *Per* Holt, C.J., in *Cole* v. *Turner* (1705) 6 Mod. 149, cited by Pollock, *supra*.

plaintiff, and no real interference with the enjoyment of his land.[1]

§ 17. *Reconsideration of the Maxim.*—After passing under review the decisions cited in this chapter, let us return to our starting point, the maxim *cujus est solum, ejus est usque ad coelum et ad inferos.* In itself it has no authority in English law. Only in so far as it has been adopted as part of our law by the judges or by text-writers of a very special degree of authority, need it concern us. I venture to submit the view that the maxim has been grievously misunderstood and misapplied so far as its upward limit is concerned. There is no question that the air and the air space are two different things. Air is certainly capable of ownership if you can capture it and confine it in a closed space such as a bottle, just as sea-water becomes the property of a shipping company when it is pumped up into a bath on one of its steamers, or of a hotel company when it is pumped into a tank in the hotel. One of the commonest forms in which air becomes the subject of ownership is when it is liquefied and put into a bottle.

But can space—whatever space may be—become the subject of ownership? I have the gravest doubts on that point. Certainly the "ownable" contents of space may be owned, whether they are minerals below the surface of the earth or buildings above it. I am not persuaded that the common law is committed to the view that mere abstract space can be the subject of ownership apart from its contents.

And does the maxim really mean that space is in itself "ownable"? I do not think it does. I take it to

[1] In a United States Government publication entitled "Law Memoranda upon Civil Aeronautics" (U.S. Government Printing Office, Washington, 1928), which contains a mass of interesting legal material, the writer, after an examination of English and American decisions upon the air space, concludes as follows: "It thus appears that the only rights in space which have actually been protected by the courts have been rights in space immediately adjacent to and connected with the surface. There are no decisions to the effect that it is a wrong against a landowner to interfere with the space over his land at such a height that the use of the surface is not affected in the slightest degree" (at p. 88). In an American case, *Hoffmann* v. *Armstrong* (1872) 48 N. Y. at p. 204, a New York Court said: "The rule or maxim giving the right of ownership to everything above the surface to the owner of the soil has full effect without extending it to anything entirely disconnected with or detached from the soil itself."

mean: "Whosoever owns a portion of the surface of the earth, also owns anything below and anything above that portion that may be capable of being reduced into private ownership." For instance, below the surface gold and silver and (usually) treasure trove belong to the Crown, and corpses in a graveyard belong to no one. Whether a surface-owner can be said to own coal and base metals ten miles below the surface is doubtful, but, at any rate, he has the exclusive right of acquiring them by winning them if he knows how to. Those that are within a known workable distance of the surface he certainly owns, whether he works them or not.

I suggest that we must reject the theory of the ownership of the whole column of air space to an indefinite height by the owner of the surface (including in the term "surface" the top floor of any structure erected upon it).[1]

I suggest further that there are only two theories which can be accepted without doing violence to that common sense for which the common law is famous. Those two theories are: (i) *that* prima facie *a surface-owner has ownership of the fixed contents of the air space and the exclusive right of filling the air space with contents*, and, alternatively, (ii) the same as (i) with the addition of *ownership of the air space within the limits of an "area of ordinary user" surrounding and attendant upon the surface and any erections upon it.* The two theories do not differ greatly in practical application.

As to (i), undoubtedly a surface-owner can extend his property upwards by growing trees or erecting buildings or telegraph poles and wires or aerials for the transmission and reception of electrical waves or masts for the mooring of airships, much in the same way as a State can extend its territory at the expense of the open sea by erecting artificial formations and so pushing outwards

[1] On the subject of "Sky-writing," Lord Dunedin wrote a letter to the *Times* newspaper of January 15, 1932, which contains the following passage: "Now, it is clear that any owner could restrain some one else from exhibiting by means of a brilliant light an advertisement on the wall of his house, and, therefore, he could theoretically in the same way restrain the unpermitted use of his bit of sky. The difficulty arises with identification." With great respect, I am unable to admit, for the reasons stated in the text, that every landowner owns a "bit of sky."

its low-water mark and by consequence its territorial waters. Moreover, the surface-owner has an exclusive right of thus enlarging his property, an exclusive right of exploiting the air space above him by placing things in it, and can prevent his neighbours from doing anything which interferes with this right.

As to (ii), it is arguable that a surface-owner automatically owns that limited portion of the air space which is necessary for the enjoyment of the ownership of the surface or which according to known human usage is capable of being filled with fixed contents, a kind of "area of ordinary user," whether in fact he makes erections in his air space or not. The objection to this second theory is that it involves the ownership of space, which I find difficult to believe possible. I suggest that the first theory adequately enables the surface-owner to claim, and the jurist to justify, all the rights and remedies that are necessary for protecting the ownership and enjoyment of the surface and erections upon it.

Further, I submit the view that in deciding whether or not any particular use by a stranger of the air space superincumbent over a man's land is actionable, either as a trespass or as a nuisance, the common law will, as in other circumstances in the past, pay due regard to the convenience of mankind and to the fact that, as the world's population increases and man's conquest of nature develops, the exclusive enjoyment of all the amenities arising from the ownership of land is continuously and inevitably decreasing.[1]

## NOTE

The following are brief references to a few foreign cases in which the *cujus est solum* maxim has directly or indirectly come into question.

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[1] For discussion of the *cujus est solum* maxim in relation to aircraft by American writers, see Zollmann, *Law of the Air*, pp. 1–29; Law Memoranda upon Civil Aeronautics, published by U.S. Government Printing Office in 1928, pp. 85–89 (cited above, p. 33, note); Hotchkiss, ch. iii.; and Kuhn in *American Journal of International Law*, iv. (1910), pp. 122–128.

For French discussions of property in the air space, see Le Blanc, *La navigation aérienne au point de vue du droit civil* (Paris, 1914), and Henri-Couannier, *Eléments créateurs du droit aérien* (Paris, 1929), ch. iii.

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*Catoire* c. *Foulon* et *Gislain* (1880), *Gobbe* c. *Catoire* (1887), and *S.* c. *M.* (1895). These three cases, the first two in the Tribunal Correctionnel de Douai and the third in the Tribunal Correctionnel de Vervins, are reported in *Revue juridique internationale de la locomotion aérienne*, vol. I (1910), pp. 48–51. They are in conflict. They all turn on the question of the legality of shooting pheasants while in flight across the prosecutors' land upon which the defendants had no right of shooting ; in the first the defendant was acquitted, in the second and third he was convicted. In the first, which contains the fullest discussion of the rights of the surface-owner, the court held, in the words of the head-note, that " l'espace aérien qui se trouve au-dessus de la surface d'un fonds n'est pas l'accessoire de ce fonds et n'appartient pas au propriétaire de celui-ci ; l'air environnant la terre est une *res communis* qui, par sa nature, répugne à l'idée d'une appropriation exclusive (C. civ. 552). Si l'article du code civil déclare que le propriétaire du sol a la propriété du dessus, cela signifie simplement qu'il a la propriété des choses qui reposent sur le sol, comme les constructions, les plantations et tout ce qui peut être considéré comme en faisant partie intégrante."

Article 552 of the Code Civil, which is clearly based on the *cujus est solum* maxim, is as follows :

" La propriété du sol emporte la propriété du dessus et du dessous.

" Le propriétaire peut faire au-dessus toutes les plantations et constructions qu'il juge à propos, sauf les exceptions établies au titre des Servitudes ou Services fonciers.

" Il peut faire au-dessous toutes les constructions et fouilles qu'il jugera à propos, et tirer de ces fouilles tous les produits qu'elles peuvent fournir, sauf les modifications résultant des lois et règlements relatifs aux mines, et des lois et règlements de police."

(For a discussion of this article and some French decisions, see Leblanc, *op. cit.*, pp. 18–90, and Tissot, *De la responsabilité en matière de navigation aérienne* (Paris, 1925), pp. 157–236.)

*Bertrand, Brinquant et Mange* c. *Société Farman*, Tribunal Civil de la Seine, July 6, 1912, Dalloz, *Recueil de Jurisprudence*, 1913, part II. pp. 117–120. Here the Court awarded damages to the lessee and occupant of a farm in respect of disturbance of various kinds in the enjoyment of it resulting from the low flying of aircraft over the farm from the defendant's school of aviation, but declined to grant an injunction restraining a repetition of such flying or to prescribe a minimum height or the nature of silencing devices to be carried by the aircraft. By inference from the refusal of the Court to award damages to the lessor of the farm (who was also a plaintiff) it would appear that it did not accept the view that a mere invasion of the air space without proof of damage is actionable. The maxim *dominus soli, dominus coeli* is discussed in a note in Dalloz, *loc. cit.* See also *Revue juridique internationale de la locomotion aérienne*, vol. iii. (1912), pp. 282–287, and *Juridical Review*, vol. xxiv. (1912–1913), pp. 321–323.

*Heurtebise* c. *Farman frères, Esnault-Pelterie et Société Borel*, Tribunal Civil de la Seine, July 10, 1914, Dalloz, *Recueil de Jurisprudence*, 1914–1915, part ii. pp. 193, 194. Here, again, the Court awarded damages to the owner and occupier of a farm whose farming operations had actually been disturbed in various ways (frightening of workers and of animals, forced landings, etc.) by aircraft coming from the defendants' neighbouring aerodromes and schools of aviation, but declined to uphold his extreme claim, based on the ownership of land, to prevent all flying over his land at whatever height. The head-note reads: "Le principe que la propriété du sol emporte la propriété du dessus doit être restreint, au profit du propriétaire, à la seule hauteur d'atmosphère utilisable, pour les constructions ou plantations (C. civ. 552); en conséquence, au dessus de cet hauteur, la liberté de l'air est complète et la circulation aérienne demeure, dans l'état actuel de la législation, affranchie de toute entrave." The *cujus est solum* maxim is discussed in a note by Henri Lalou in Dalloz, *loc. cit.*

## UNITED STATES OF AMERICA

*Johnson* v. *Curtis Northwest Airplane Co.* (1923) (District Court of Ramsey County, Minnesota) reported in Zollmann, *Cases* (1930), pp. 1–4, and in *Revue juridique internationale de la locomotion aérienne*, vol. viii. (1924), pp. 138–141. Here the Court, while granting a temporary injunction to restrain the defendants from flying over the plaintiff's premises at an altitude lower than 2,000 feet, declined to apply the maxim so as to render illegal mere passage through the "upper air."

*Harry Worcester Smith et al.* v. *New England Aircraft Co., Inc. et al.* (1930) (Supreme Court of Massachusetts) (Mass. 1930), 170 N. E. 385. Here the Court enunciated as a rule of law that the private ownership of the air space is assumed to be limited to what is necessary for the present use of the property, declined to restrain by injunction flying above 500 feet, and held that flights as low as 100 feet constituted trespasses, but were not restrainable by injunction as they did not interfere with the utility of the subjacent land which was woodland. It was considered relevant that the Federal Air Traffic Rules and a Massachusetts statute had fixed 500 feet as the minimum height for flying in circumstances such as prevailed in this case; see Sweeney in *Journal of Air Law*, vol. i. (1930), pp. 367–369. See also *Commonwealth* v. *Nevin and Smith* (1922), 2 Pa. District and County Rep. 241, Zollmann, *Cases*, pp. 5–7, where flying over a farm was held not to amount to criminal trespass. "'Wilfully to enter upon land,' as used in the Act, indicates an encroachment on or interference with the owner's occupation of the soil; but is not synonymous with a flight through the air over it, which has yet, so far as we are aware, to be held an entry upon it, and a meaning of the term not heretofore attributed to it."

*Swetland* v. *Curtiss Airports Corporation* (1930) (N. D. Ohio, 1930), 41 F. (2d.) 929. Here the United States District Court granted an injunction to restrain flying over the plaintiff's country estate below 500 feet, but declined to restrain as a nuisance flying above 500 feet in the absence of evidence that it interfered with his comfortable enjoyment of his estate or his effective possession (see Sweeney in *Journal of Air Law*, vol. ii. (1931), pp. 82–94, who states that the question of trespass was also extensively discussed, though apparently the injunction went on the ground of nuisance).

For a number of American cases in which the maxim has been applied outside the sphere of aviation, see Hotchkiss, § 16.

### CANADA

In the case of *In re The Regulation and Control of Aeronautics in Canada* [1930] S. C. R. 663, reversed on appeal by the Privy Council [1932] A. C. 54, the maxim is cited by Newcombe, J., in the Supreme Court of Canada and in argument before the Privy Council. The decision of the Privy Council asserts that it lies within the domain of the Dominion legislature, and not within that of the legislatures of the Provinces, to give effect to the Convention for the Regulation of Aerial Navigation of 1919.

# CHAPTER 3

## NUISANCE, NEGLIGENCE, AND STRICT LIABILITY IN RESPECT OF DANGEROUS THINGS

§ 18. In this chapter we shall consider, first, the tort of Nuisance in connection with the use of the air ; [1] secondly, the question of Negligence in the use of aircraft at common law ; and, thirdly, the strict liability which the law imposes in certain cases in respect of the use of dangerous things.

### NUISANCE

A nuisance is defined in § 831 of the *Digest of English Civil Law* as

> " an act or omission whereby a person is unlawfully annoyed, prejudiced, or disturbed in the enjoyment of land ; whether by physical damage to the land, or by other interference with his enjoyment of the land or with his exercise of an easement, profit, or other similar right, or with his health, comfort, or convenience. The fact that such annoyance, prejudice, or disturbance legally amounts to trespass, is no bar to an action of Nuisance." [2]

It is desirable to consider the question of aircraft in relation to the tort of nuisance from two points of view : (i) whether the mere presence of an aircraft fixed above the land of another entitles the latter to any remedy against the owner of or other person responsible for the aircraft, and (ii) whether, and, if so, in what circumstances, an aircraft in flight over another person's land

[1] For an instance of a Scottish action for " nuisance " and " fault or negligence " against a parachutist who landed on a farm from a balloon and thus attracted a crowd of spectators thither, see *Scott's Trustees* v. *Moss*, cited above, at p. 31.

[2] Upon the relations of four branches of the law of tort, all of which are relevant to our present problem, namely Trespass, Nuisance, Negligence, and the Rule in *Rylands* v. *Fletcher*, see Winfield, *Nuisance as a Tort* in *Cambridge Law Journal*, vol. iv. (1931), pp. 189–206.

constitutes a nuisance. As to (i) the cases discussed in the preceding chapter appear to show that a permanent projection over the land of another by a natural object [1] such as the branch of a tree or a manufactured object [2] such as the cornice of a house will constitute an actionable nuisance if damage results ; in some cases, as, for instance, that of a cornice which must shoot rain on to the plaintiff's land when rain falls, the court will infer damage.[3] There is little doubt that if I moor a balloon over the land of another at an altitude low enough to cast a shadow to frighten his animals,[4] and thus injure them, or to enable me to invade his privacy by seeing what he is doing, I have committed an actionable nuisance.

As to (ii) when the object complained of is not fixed, but is merely passing across and over the plaintiff's land, it will only be actionable as a nuisance upon proof of damage, which does not mean of necessity actual contact with land or structures, but includes interference with the reasonable enjoyment of them.[5] This interference might arise from various causes, for instance, a reasonable apprehension of danger resulting from the alien object ; [6] or the stoppage of light, either perpendicular or lateral, or of air passing through a defined channel, or, I submit, a purposeful invasion of privacy as contrasted with the incidental lack of privacy which every proprietor of land suffers when his land is bounded by that of another.[7] The conclusion which we draw from the cases upon " dangerous things " about to be discussed is that the mere presence of an aircraft in the air is not *per se* a nuisance any more than is the presence of a

[1] *Lemmon* v. *Webb*, *supra*. The case of a branch of a tree overhanging a highway is different : *Noble* v. *Harrison* [1926] 2 K. B. 332.

[2] *Pickering* v. *Rudd*, *supra*.

[3] *Fay* v. *Prentice*, *supra*.

[4] See an American case where in respect of Army aeroplanes a claim for damage to cattle and to fences owing to the stampeding of the cattle was made against the Federal Government and failed : *Decision of U.S. Comptroller-General McCarl*, 1923, 3 Comp. Gen. 234 ; Zollmann, *Cases*, p. 7.

[5] *Pickering* v. *Rudd*, *supra* ; *Clifton* v. *Viscount Bury*, *supra*.

[6] *Clifton* v. *Viscount Bury*, *supra*.

[7] It is not fantastic to cite *Hickman* v. *Maisey* [1900] 1 Q. B. 752, in this connection ; the plaintiff could not have complained of *bona fide* passers-by looking through an open fence upon his boundary, but had a cause of action against a person who purposefully invaded his privacy by making an unlawful use of the highway, the soil of which was vested in the plaintiff.

mechanically propelled vehicle upon a highway; but that does not mean that in no circumstances can an aircraft become a nuisance. We have no hesitation in saying that it certainly can be so as the result of a variety of circumstances;[1] for instance, by reason of flying unreasonably near to the surface of the earth, by unreasonable and unnecessary noise, or by reason of being engaged upon experimental or acrobatic operations attendant with danger to persons below which might equally well be carried out in parts of the country which are uninhabited or sparsely inhabited. A motor vehicle on a road is not *per se* a nuisance, but there are many circumstances as to speed, noise and otherwise which make it a nuisance.[2]

We have examined in the preceding lecture a number of cases relating to nuisance resulting from the projection of fixed and of moving objects. We must now consider a few cases relating to the passage of air, to light, and to privacy.

§ 19. *The Passage of Air.*—In spite of two old and obscure decisions[3] English law declines to recognize that the owner of land, with or without buildings upon it, can acquire by prescription or grant or otherwise any right to the general and uninterrupted passage of air across, or to the circulation of air round, his land or buildings. Thus in *Webb* v. *Bird*[4] the owner of a windmill thirty years old failed to obtain damages or an injunction against a person who erected a building at a distance of twenty-five yards from the mill with the result of diverting " the streams and currents of air and wind

[1] See *Roedean School, Limited* v. *Cornwall Aviation Co., Limited, and Phillips*, later, p. 74.

[2] See *McKee* v. *Malcolmson* [1925] N. Ireland 120, where it was held that compensation for a death resulting from the holding of a motor-cycle competition on a public road could be recovered in an action for nuisance. For an instance of an injunction granted to restrain excessive noise caused by the testing of aeroplane engines on the ground by the manufacturers, see *Bosworth-Smith* v. *Gwynnes, Limited* (1919) 122 L. T. 15.

[3] In *Viner's Abridgment*, tit. " Nuisance," G. pl. 19: " Winch, J., said, " that where one erected a house so high that the wind was stopped from the windmills in Finsbury Fields, it was adjudged that it should be broken down " (apparently in 1621). The other is in 2 *Rolle's Abridgment* 704, Triall, C., pl. 23, where the top two yards of a house which the defendant *levavit ad nocumentum* of the plaintiff's mill were ordered to be " dejected." See the valuable notes on these two decisions in Gale on *Easements* (11th ed., 1932, pp. 322, 323).

[4] (1861) 30 L. J. C. P. 384.

from the said windmill." The Court of Common Pleas said that the law of England knew no such right, and that it would be dangerous to create it. This decision was followed in 1879 in *Bryant* v. *Lefever*,[1] when the Court of Common Pleas (Bramwell, Brett and Cotton, L.JJ.) held that the owner of a building with chimneys had no natural right, and could not by prescription or by a lost grant or under the Prescription Act of 1832 claim to have acquired a right, to the uninterrupted access of air to his chimneys over his neighbour's land; thus he could not recover damages from his neighbour who by raising the height of his building prevented "the wind blowing to and over the plaintiff's house when in some directions, and passing away from it when in others," thus causing the plaintiff's chimneys to smoke.[2] According to Bowen, L.J.,[3] the reason for the rule that a right to the general and uninterrupted passage of air over the unlimited surface of adjoining land cannot be acquired by prescription is "the best of all reasons, the reason of common sense, because you cannot acquire any rights against others by a user which they cannot interrupt."

Reverting to *Bryant* v. *Lefever*,[4] we find Cotton, L.J., saying [5] that "a right by way of easement to the access of air over the *general unlimited surface* of a neighbour cannot be acquired by mere enjoyment" (italics ours). On the other hand, there is ample authority for the rule that I can acquire by prescription a right by way of easement to the uninterrupted access of air through a window or shaft or other defined aperture in my building from across my neighbour's land.

The earlier cases usually speak of "light and air" as if they were synonymous or, at any rate, inseparable, and in the nature of things it is not surprising to find that in most cases of obstruction by buildings both these

[1] 4 C. P. D. 172.

[2] These decisions are followed in *Harris* v. *De Pinna* (1885) 33 Ch. D. 238, and *Chastey* v. *Ackland* [1895] 2 Ch. 389; [1897] A. C. 155, which add but little to them. See also *Roberts* v. *Macord* (1832) 1 Moody and Rob. 230, and *Potts* v. *Smith* (1868) L. R. 6 Eq. 311.

[3] In *Harris* v. *De Pinna*, *supra*, at p. 262.

[4] *Supra*.

[5] At p. 180.

amenities are affected. Gradually, however, the separate recognition of a right to the access of air through a window or defined aperture becomes established. Thus in *Dent* v. *Auction Mart Co.*[1] in 1866, Sir W. Page Wood, V.-C., said :

> " There is a staircase lighted in a certain manner by windows which, when opened, admit air. The defendants are about to shut up these windows, as in a box with the lid off, by a wall about eight or nine feet distant, and some forty-five feet high ; and in that circumscribed place they propose to put three water-closets. There are difficulties about the case of air distinguished from that of light; but the Court has interfered to prevent the total obstruction of all circulation of air ; and the introduction of three water-closets into a confined space of this description is, I think, an interference with air which this Court will recognize on the ground of nuisance. This is, perhaps, the proper ground on which to place the interference of the Court, although in decrees the words ' light and air ' are often inserted together as if the two things went *pari passu*."

In *Hall* v. *Lichfield Brewery Co.*[2] in 1880, Fry, L.J., held that the interruption of the free access of air into a slaughter-house through two apertures which had existed for thirty years, was actionable by the owner of the slaughter-house. And in *Bass* v. *Gregory*[3] in 1890, Baron Pollock granted an injunction and damages in favour of the owner of a public-house, the cellar of which had, for at least forty years, been ventilated by means of a hole or shaft cut through the rock and communicating with an old and disused well situated in the defendant's yard ; the defendant's well had in fact become the ventilating shaft for the cellar, and he was not allowed to stop it up ; a lost grant conferring the easement upon the plaintiff must be inferred. And in *Cable* v. *Bryant*[4] in 1907, a right to the access of air through a defined aperture in the wall of a stable was implied from general words in the conveyance of the stable to the plaintiff.

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[1] L. R. 2 Eq. at p. 252.

[2] 49 L. J. Ch. 655 ; 43 L. T. (N. S.) 380. See also *Gale* v. *Abbot* (1862) 8 Jur. N. S. 987.

[3] (1890) 25 Q. B. D. 481. This case presents an additional feature of interest in the respect that here the question of air appears to be entirely divorced from the question of light.

[4] [1908] 1 Ch. 259.

§ 20. *The Right to Light.*—Nor can we in this preliminary investigation of the legal position of the air in England ignore the question of light. Light may be enjoyed when received perpendicularly or when received laterally. Very little is ever heard in a law court or read in a legal decision of perpendicular light, and the easement known as the right to light or " ancient lights " always refers to light received laterally. With perpendicular light we have a direct concern. According to the leading English text-book dealing with light, Gale on *Easements*, now in its eleventh edition, and nearly a century old, the right to perpendicular light is a natural right of property and need not be based on prescription or on a grant, express or implied. " The strict right of property," says Gale,[1] " entitles the owner to so much light only as ' falls perpendicularly on his land.' " And the learned author bases this right on the *cujus est solum* maxim. So far as I am aware, judicial authority on the subject of perpendicular light is lacking, but there can be no manner of doubt that, if my neighbours on either side of me contrived to suspend a canopy over my garden, maintained by posts affixed to their soil and not touching mine, I could restrain them by injunction and recover for any damage sustained either as a trespass, or as a nuisance consisting in the obstruction of my perpendicular light. Similarly, if a balloon or dirigible airship were anchored above my house or land in such a way as to interfere with my perpendicular light, I apprehend that that in itself would be an actionable nuisance.

With lateral light, however, we have less concern, though the close association [2] until recently of the enjoy-

[1] (11th ed., 1932), p. 301.

[2] As to the divergence between the light and the air cases, see Sir W. Page Wood, V.-C., in *Dent* v. *Auction Mart Co.*, *supra*, at p. 252 ; Lord Selborne, L.C., in *City of London Brewery* v. *Tennant* (1873) 9 L. R. Ch. at p. 221, and Cotton, L.J., in *Harris* v. *De Pinna*, *supra*, at p. 259. Possibly the divergence between the respective positions of light and air dates from the Prescription Act, 1832, which recognized the right to light, but no right to a general access of air (see Erle, C.J., in *Webb* v. *Bird*, *supra*, at p. 387), though, at any rate as long ago as the case of *Bland* v. *Mosely*, *infra*, Wray, C.J., spoke of the enjoyment of air and the enjoyment of light as two different things, while seeming to regard their legal position as identical, and in *Aldred's Case*, *supra*, the four *desiderata* for a house are *habitatio hominis*, *delectatio inhabitantis*, *necessitas luminis*, *et salubritas aëris*, to which I should like to add remoteness from the internal combustion engine, whether on land or water or in the air See also Cotton, L.J., in *Bryant* v. *Lefever*, *supra*, at p. 180.

ment of air and the enjoyment of light have made it necessary for us to mention the subject of lateral light. The enjoyment of lateral light differs from that of perpendicular light in that the latter is a natural right of property, while the former must be acquired by prescription or by grant, express or implied. It differs again from the enjoyment of air in certain comparatively minor respects: firstly, the two are physically different and the one can exist without the other as the case of *Bass* v. *Gregory* [1] shows; secondly, though both can be acquired by prescription, there is authority for the view that the Court will require stronger evidence of nuisance in the case of air than in the case of light before interfering to protect the right; [2] and, thirdly, the right to lateral light is governed as regards statutory prescription by section 3 of the Prescription Act, 1832, and the right to the access of air through a defined aperture by section 2.[3] But the right to lateral light closely resembles this right to air in that the right can only exist in respect of a defined aperture.[4]

§ 21. *The Question of Privacy*,[5] to which is closely allied that of prospect. In *Bland* v. *Mosely*,[6] in 1587, Wray, C.J., said that "for stopping as well of the wholesome air as of light, an action lies . . . for both are necessary. . . . But . . . for prospect, which is a matter only of delight, and not of necessity, no action lies for the stopping thereof. . . . The law does not give an action for such things of delight." Lord Blackburn in *Dalton* v. *Angus*,[7] remarked that "the law has

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[1] *Supra.*

[2] *City of London Brewery Co.* v. *Tennant, supra.* See *Cable* v. *Bryant* [1908] 1 Ch. at p. 263.

[3] *Harris* v. *De Pinna, supra*; *Simpson* v. *Godmanchester Corporation* [1897] A. C. at p. 709.

[4] See Gale, *op. cit.*, at p. 31 ("the right to receive light by ancient apertures") and p. 301.

[5] See Winfield, *Privacy*, in *L.Q.R.*, xlvii. (1931), pp. 23–42, and Gutteridge and Walton, *Comparative Law of the Right to Privacy*, *ibid.*, pp. 203–228. The matter has also arisen in connection with the law of Defamation; see *Monson* v. *Tussaud* [1894] 1 Q. B. at p. 679; *Corelli* v. *Wall* (1906) 22 T. L. R. 532. With this we are not concerned. See also *Pollard* v. *Photographic Co.* (1888) 40 Ch. D. 345.

[6] Cited in *Aldred's Case* (1610) 9 Co. Rep. at 58 b.

[7] (1881) 6 App. Cas. at p. 824.

always, since *Bland* v. *Mosely*, been that there is a distinction; that the right of a window to have light and air is acquired by prescription, and that a right to have a prospect can only be acquired by actual agreement." Not only is there no natural right of prospect or of privacy, but no such right can be acquired by prescription or by presuming a lost grant; that is to say, neither of these so-called rights is an easement recognized by English law.[1] There is no occasion for us here to examine the so-called right of prospect, beyond remarking that the right to stop up another man's prospect is frequently the means of ensuring privacy. As Twisden, J., remarked in *Knowles* v. *Richardson*:[2] "Why may not I build up a wall that another man may not look into my yard? Prospects may be stopped, so you do not darken the light."

Thus in *Chandler* v. *Thompson*[3] in 1811, Le Blanc, J., said that "although an action for opening a window to disturb the plaintiff's privacy was to be read of in the books, he had never known such an action maintained; and when he was in the Common Pleas he had heard it laid down by Lord C.J. Eyre that such an action did not lie, and that the only remedy was to build on the adjoining land, opposite to the offensive window." In *Johnson* v. *Wyatt*,[4] a case of interference with the light and air by increasing the height of a building, in 1863, Turner, L.J., remarked: "That the windows of the house may be overlooked and its comparative privacy destroyed, and its value thus diminished by the proposed erection . . ., are matters with which, as I apprehend, we have nothing to do." Similarly, Lord Chancellor Westbury in *Tapling* v. *Jones*,[5] in 1865, referred to the phrase "invasion of privacy by opening windows" and said: "That is not

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[1] The civil law recognized a servitude *ne prospectui offendatur*.

[2] (1669) 1 Mod. 55. So also Lord Chancellor Hardwicke in *Attorney-General* v. *Doughty* (1752) 2 Ves. Sen. 453: "I know no general rule of common law which warrants that, or says that, building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns." And see Lord Blackburn's comments in *Dalton* v. *Angus* (1881) 6 App. Cas. at p. 824.

[3] 3 Camp. at p. 82.

[4] 33 L. J. Ch. at p. 398; 2 De G. J. and Sm. at p. 27.

[5] 11 H. L. C. at p. 305. See also *Cotterell* v. *Griffiths* (1801) 4 Esp. 69.

treated by the law as a wrong for which any remedy is given."

In *Browne* v. *Flower* [1] the tenants of a flat on the ground floor sought a mandatory injunction for the removal of an external open-work iron staircase from the ground to a flat on the first floor which, after the beginning of the tenancy had been erected by one defendant, the tenant of the first-floor flat, with the licence of another defendant who was (substantially) the common landlord : the third defendant was the sub-tenant of the premises on the first floor to which the staircase gave access. The plaintiffs' main objection to the staircase was that persons using it could see directly into their bedrooms, and this was an interference with their right of privacy. " Either they have less privacy, or if they secure their privacy by curtains they have less light." [2] Parker, J., as he then was, declined either to grant an injunction or to award compensation in the form of damages, because the erection of the staircase constituted no breach of covenant and no derogation from the landlord's grant ; it was merely an interference with comfort or privacy. " Inasmuch [3] as our law does not recognize any easement of prospect or privacy, and . . . the plaintiffs' lights are not interfered with, it is difficult to find any easement which can have been interfered with by the erection of the staircase in question." [4]

But although a right to privacy cannot be an easement, there is nothing to prevent it from being created by covenant, and the court will enforce a covenant which either expressly or merely as the result of its terms creates such a right. In *Manners* v. *Johnson*,[5] in 1875, a covenant not to build beyond a certain line of frontage, the object or the effect of which was to secure privacy, was enforced. Hall, V.-C., said : [6] " It is said that there is no covenant as to privacy ; but privacy will be interfered with, and there is a covenant that the act shall not

[1] [1911] 1 Ch. 219.
[2] At p. 227.
[3] At p. 225.
[4] See also *Campbell* v. *Paddington Borough Council* [1911] 1 K. B. 869.
[5] 1 Ch. D. 673.
[6] At p. 681.

be done, the doing of which causes the invasion of privacy, and there is accordingly damage and injury in respect of which relief ought to be granted." Privacy is something of which the law will take notice, and the right to which when legally acquired the law will protect; as Lord Chancellor Cowper said in *Cherrington* v. *Abney*,[1] " privacy is valuable."

Another illustration of the indirect protection by law of the enjoyment of privacy is afforded by *Hickman* v. *Maisey*,[2] in 1900. There a racing-tout was held liable in an action for trespass on the ground that by walking to and fro on the highway for the space of an hour and a half in order to watch and take notes of the trials of the plaintiff's racehorses he had exceeded the ordinary and reasonable user of the highway, the soil of which was vested in the plaintiff. The jury found a verdict for the plaintiff, an injunction was granted to restrain the defendant, and the judgment of Day, J., was affirmed by the Court of Appeal. Two passages from the judgments delivered in that court deserve to be quoted. " I do not agree . . .," said A. L. Smith, L.J.,[3] " with the argument of the defendant's counsel to the effect that the intention and object of the defendant in going upon the highway cannot be taken into account in determining whether he was using it in a lawful manner. I think that his intention and object were all important in determining that question." And Romer, L.J., said :[4] " What the defendant did in the present case amounted in my opinion to an interference with the plaintiff's rightful exercise of ownership over his adjoining land by using it as a place for the training and trial of racehorses. *No doubt, if what the defendant did had been done by him on soil which was not vested in the plaintiff, the latter would have had no legal right to complain. . . .*" (italics ours).

## NEGLIGENCE

§ **22.** It is unnecessary here to enter into the question whether negligence deserves the distinction of being

[1] (1709) 2 Vern. 646.
[2] [1900] 1 Q. B. 752.
[3] At p. 757.
[4] At p. 759.

regarded as a specific tort or not.[1] It will suffice to enquire whether and to whom a person navigating an aircraft owes a legal duty to take care; if such duty exists and a breach of it occurs resulting in damage, an action ("on the case" if a label must be found for it) will lie against him. "This duty of carefulness," said Sir John Salmond,[2] "is not universal; it does not extend to all occasions, and all persons, and all modes of activity."

It is abundantly clear that a person who drives a vehicle on a road or navigates a vessel on the sea or in a river or lake owes a duty of care to other persons so situated that they may sustain damage as the result of his carelessness,[3] and it cannot be denied that at least as heavy a duty rests upon the aerial navigator. That duty is owed both to the other users of the air and to persons on the surface of the earth and in or on structures upon it, in regard both to personal injury and to injury to property, real or personal. This is an assertion, but I think it follows so clearly from general principles that the lack of judicial authority up to date in no way invalidates the assertion. In Baron Alderson's well-known definition,[4] "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." But, as Sir Frederick Pollock points out,[5] we must remember that "negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care." That the navigator of an aircraft is in this situation will not be doubted. When he is taxi-ing along an aerodrome, he is in this situation, and when he rises into the air, his duty is certainly no less; whether it is greater, we shall discuss later. Moreover, the amount of care due from him is not measured by a standard personal to him.

[1] See Winfield in *L.Q.R.*, xlii. (1926), pp. 184–201.
[2] *Op. cit.*, at p. 25.
[3] *Per* Lord Blackburn in *Cayzer* v. *Carron Co.* (1884) 9 App. Cas. at p. 882, the duty is the same at the common law and by the law maritime.
[4] In *Blyth* v. *Birmingham Waterworks Co.* (1856) 11 Ex. at p. 784.
[5] *Op. cit.*, p. 453.

The defence that he is a beginner will not avail him. " The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. The test is whether the defendant has done " all that any skilful person could reasonably be required to do in such a case." [1]

Moreover, the duty of care is broken whether the negligent act or omission occurs in the course of the operation of a motor-car or a ship or an aircraft or in some antecedent matter such as defective equipment or machinery for which the operator is responsible and which causes the damage complained of. For instance, it is no defence that the cause of the damage was a negligent defect in a brake which prevented the brake when applied from producing the normal effect of the application of a brake.[2]

§ 23. *Res ipsa loquitur.*—Assuming then, as I think we may safely assume, that the navigator of an aircraft owes a duty of care to persons likely to be damaged as the result of his negligence, a further question arises: Are the circumstances of aerial navigation to-day normally such, or can they in special cases be such, that the maxim *res ipsa loquitur* [3] applies to them? That is to say, does the mere proof of injury or loss caused by the navigation of an aircraft raise a presumption of negligence which the navigator is under the burden of disproving? Sir John Salmond [4] stated that the maxim applies " whenever it is so improbable that such an accident

[1] *Ibid.*, p. 457, citing Bayley, J., in *Jones* v. *Bird* (1822) 5 B. & Ald. at p. 846.

[2] *British Columbia Electric Railway Co.* v. *Loach* [1916] 1 A. C. 719. The effect of this decision on the point of contributory negligence may be controversial, but the controversy does not extend to the proposition in the text.

[3] This rule is stated in § 729 of the *Digest of English Civil Law, supra*, as follows: " When an object (not being a live animal) is apparently under the control and management of the defendant, and it causes damage to the plaintiff of a kind which, in the ordinary course of things does not happen if the person having control or management of similar objects exercises proper care, and the defendant is bound to exercise care to prevent it damaging the plaintiff, the damage will be presumed (in the absence of explanation) to have been caused by the defendant's negligence."

(As to the words " not being a live animal," see, however, *Gayler* v. *Davies* [1924] 2 K. B. 75, but we need not discuss that point.)

[4] *Op. cit.*, at p. 34.

would have happened without the negligence of the defendant that a reasonable jury could find *without further evidence* that it was so caused" (italics ours), and he cites Erle, C.J., in *Scott* v. *London Docks Co.*[1] (a case of a fall of bags of sugar falling while being lowered by a crane), as follows:

> "There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from the want of care."

Familiar instances of the application of this maxim are the cases of a moving ship colliding with a ship at anchor,[2] a collision between two trains operated by the same railway company,[3] a brick falling from a railway bridge on to a passer-by, and a barrel rolling out of an upper window on to a person in the street below.[4] A frequent element in the cases in which the maxim is applied is that the object causing the damage was entirely in the control of the defendant and he and his servants alone were in a position to explain how the accident happened.[5]

In the case of damage done by anything which falls from a passing aircraft, I submit that the *res ipsa loquitur* maxim is entirely appropriate. Things do not ordinarily fall out, a person on the surface of the earth cannot see why it was that the offending article fell out, and it is reasonable to cast upon the aerial navigator the burden of disproving negligence.[6] In the case, however, of injury done by an aircraft which crashes, there is a

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[1] (1865) 3 H. & C. at p. 601.

[2] *The Annot Lyle* (1886) 11 P. D. 114; *The Indus* (1886) 12 P. D. 46.

[3] *Skinner* v. *London, Brighton & South Coast Railway Co.* (1850) 5 Exch. 787.

[4] See Salmond, *loc. cit.*, and Broom, *Legal Maxims*, 9th ed., 1924 (Byrne), pp. 213–215; Roberts and Gibb, *Collisions on Land* (3rd ed. 1932), p. 16.

[5] For an examination of *res ipsa loquitur*, see Beven, pp. 122–141. See also Fletcher Moulton, L.J., in *Wing* v. *London General Omnibus Co.* [1909] 2 K. B. at p. 663, quoted later in this chapter. Wigmore on *Evidence* (2nd ed., 1923), § 2509, cites a large number of cases, English, Canadian and American.

[6] See *Byrne* v. *Boadle* (1863) 2 H. & C. 722.

circumstance which should make us pause for a moment before hastily concluding that the maxim should apply; that is the fact that in the case of so many crashes there is no one left to tell the tale and explain what went wrong. Nevertheless, I submit that *res ipsa loquitur* ought to apply. It is not a principle of liability, but a rule of evidence. Its object seems to me to be to help a plaintiff in a case where he is so situated that it was impossible for him to see, and is equally impossible for him to discover, what went wrong and resulted in his injury or loss, or where the defendant is so situated that he and his servants were in sole control of the object which caused the injury or loss and are the only persons who can throw any light upon the affair. The maxim must not be confused with any principle imposing an unusual degree of liability upon the user of dangerous things—a principle we are about to discuss; it is nothing more than a rule of evidence, and even though the pilot of an aircraft may not be there to tell his story, it is usually possible to throw a considerable amount of light upon the cause of the accident by means of the evidence of spectators and an examination of what is left of the machine.

American writers [1] incline to the view that the *res ipsa loquitur* maxim should apply in the case of damage done by aircraft, and in one reported case in the State of New York it has been applied to an object falling from an aircraft and causing damage.[2]

## STRICT LIABILITY IN RESPECT OF DANGEROUS THINGS

§ 24. In the present state of the authorities upon this topic, no one enters lightheartedly upon a discussion of it. All that can usefully be said upon it for some time to come has been said by Dr. Charlesworth in his book entitled *Liability for Dangerous Things*, published in

[1] Hotchkiss, § 30; Zollmann, *Law of the Air*, pp. 72, 73; Newman in *Columbia Law Review*, xxix. (1929), at pp. 1046–1048.

[2] *Sollak* v. *State of New York* (1927) 2 United States Aviation Reports, 42, cited by Nokes and Bridges, *Law of Aviation* (1930), p. 111. I have not seen it. See also Allen, *Transportation by Air and the Doctrine of Res Ipsa Loquitur*, in *American Bar Journal*, July, 1930.

1922, and by Dr. Stallybrass in a valuable article entitled *Dangerous Things and Non-natural user of Land*, appearing in the *Cambridge Law Journal* in 1929.[1] I should, however, be neglecting my duty if I did not examine, however briefly, and if only to dismiss it, the connection of aircraft with this ground of liability. Essentially, the struggle to place an instrument of damage in the category of " dangerous things " represents an attempt to fix liability upon a defendant in whom a plaintiff is unable to establish negligence or knowledge of a defect in that instrument.[2] Danger is a relative conception, and what might seem dangerous to one generation might not be regarded as dangerous by a later one.[3]

I shall deal with the principle of strict liability under two headings without feeling bound to stop to examine the scientific or historical connection between them: (i) the liability of an occupier of land in respect of the escape from it of things which he has brought upon it, and (ii) the liability of a person who is in control of or responsible for mechanically propelled vehicles.

(i) The first ground of liability is defined in the *Digest of English Civil Law* as follows: [4]

> § 852. " A person who, for his own purposes, brings on land in his occupation, and collects and keeps there, anything likely to do mischief if it escapes, is *prima facie* answerable for all damage to the land of another which is the consequence of the escape. But he can excuse himself by showing that the escape was due to the plaintiff's default, or to the ' act of God ' (*vis major*)."

This principle has been applied to the escape, amongst other things, of water, fire, gas, electricity, poisonous leaves and (by a questionable extension) vibration caused

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[1] Vol. iii., No. 3, pp. 376–397. See also Goodhart, *ibid.*, vol. iv., No. 1 (1930), pp. 13–33 (" Liability for Things Naturally on the Land ").

[2] See Pollock, at p. 500: " the magnitude of the danger, coupled with the difficulty of proving negligence as the specific cause in the event of danger having ripened into actual harm."

[3] See Beven, at p. 555: " With the change of habits and modes of life comes a change of legal liabilities—especially in such a branch of the law as negligence."

[4] *Supra*; this title being the work of Sir J. C. Miles. On this branch of the topic, see particularly Goodhart, *op. cit.*

by driving piles, and is usually referred to as the *Rylands* v. *Fletcher* [1] principle.

The rule is a means of fixing with liability the owner of a potentially dangerous thing which without any contemporary negligent act or omission on his part escapes on to neighbouring land; the negligence, if indeed the rule is based on negligence and is not a survival of early forms of absolute liability irrespective of fault, is antecedent to the escape and consisted in the placing or accumulation of the dangerous thing on the land.

I do not think this heading need detain us. We are concerned with the liability of the person responsible for an aircraft engaged in taking-off, flight, or landing. Whether he occupies land or not is immaterial, and it is impossible to apply the conception of an " escape " to an aircraft which leaves its aerodrome or other point of departure under human control.[2]

It is conceivable that the *Rylands* v. *Fletcher* principle might apply in such rare cases as that of an aircraft accidentally starting, with no pilot on board and without any negligence, on the defendant's aerodrome and " escaping " on to the plaintiff's land,[3] but that is not the question under discussion, and we can leave it as a legal conundrum for solution when it arises or in a law

[1] (1868) L. R. 3 H. L. 330. See Pollock, pp. 500–513, and Salmond, pp. 344–374, whose treatment of the principle differs considerably from Sir Frederick Pollock's.

[2] Even, I incline to think, an aircraft which is capable of flying without a pilot, being directed either from the ground or from another aircraft: see Article 15 of the Protocol of June 15, 1929, amending the Convention of 1919. Hotchkiss, § 29, regards *Guille* v. *Swan* (see above, p. 31) as an application of the *Rylands* v. *Fletcher* rule, and disapproves of the analogy. But the liability in respect of dangerous animals referred to by Lord Ellenborough in *Leame* v. *Bray* (1803) 3 East, 593, and quoted in *Guille* v. *Swan*, is different from the *Rylands* v. *Fletcher* type of liability, and, moreover, *Guille* v. *Swan* is a case of trespass. It is true that Lord Ellenborough spoke of putting an animal *or carriage* in motion, but as *Holmes* v. *Mather* (1875) 10 Exch. 261, and *Stanley* v. *Powell* [1891] 1 Q. B. 86 show, *Leame* v. *Bray* must now be regarded as a decision on the form of the action, trespass or case, and not as an authority in favour of a trespass which is neither intentional nor negligent being actionable.

[3] In a German case, cited by Zollmann, *Law of the Air*, p. 69, *S. B.* v. *Graf Zeppelin* (1912) 78 Entscheidungen des Reichsgerichts in Zivilsachen, p. 171, the plaintiff, a spectator, was injured by a dirigible which was torn from its moorings by an extraordinary gale and destroyed, and failed to recover damages on the ground that, though the undertaking was inevitably dangerous, it was impossible to eliminate all danger, however much care was exercised. Contrast *Maerkische Industrie-werke* v. *M.* (1920), 100, *ibid.*, p. 69.

moot. A court which would apply the *Rylands* v. *Fletcher* principle in such a case might logically, I think, decline to apply it to an aircraft which causes damage in the course of a normal flight or taking-off or landing.

§ 25. (ii) Dr. Charlesworth argues [1] (rightly, I venture to think), that " an aircraft is no more at common law a dangerous thing than a motor-car.[2] An aircraft, when not in flight, is quite harmless, and although, when in the air, it is dangerous, in the same sense as a suspended lamp is dangerous, still that is not enough to make it a dangerous thing."

In his opinion, before an article can be regarded as a dangerous thing, " its power to cause damage must be (i) inherent, (ii) invariable, and (iii) due to human agency." [3] " This inherent power of doing harm is not possessed even by the most complicated machinery. Machinery is quite harmless unless it is put in motion, and if it is left entirely alone it is incapable of doing harm." It is, therefore, not in the same category as animals, fire, water, explosives, gas, electricity, etc.

But two questions arise. Is the principle applicable to the case of a thing which is removed, from the land on which it was, under control such as a motor-car or an aircraft ? And can such articles as motor-cars or aircraft come within the category of legally " dangerous things " ? A negative answer to the second question would render it unnecessary to consider the first, and we shall therefore address ourselves to the second.

*Movable Chattels. Horse-drawn vehicles.*—The liability of the owner of movable chattels was differentiated from the stricter liability of the occupier of premises long before the cases of motor vehicles begin. In *Quarman* v. *Burnett* in 1840, a case of damage done by a carriage drawn by two horses, Baron Parke, after referring to the duty of " a man in possession of fixed property " to " take

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[1] *Op. cit.*, p. 14. Hotchkiss, § 34, takes the same view.

[2] It seems that American courts are " practically unanimous " in refusing to classify an automobile among things dangerous *per se*. See Lattin in *Michigan Law Review*, xxvi. (1928), at p. 865, and Horack on " *The Dangerous Instrument Doctrine* " in 26 *Yale Law Journal* (1917), p. 224.

[3] At p. 7.

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care that his property is so used or managed that other persons are not injured," said : [1]

> " Such injuries are in the nature of nuisances ; but the same principle . . . does not apply to personal moveable chattels, which, in the ordinary conduct of the affairs of life, are intrusted to the care and management of others, who are not the servants of the owners . . ."

*Ships.*—A similar view was adopted by Butt, J., in *The European*,[2] a case of an action for damage by collision to a ship at anchor done by a steamship fitted with a patent steering-gear which, without negligence on the part of the defendants, failed to act at the critical moment. The plaintiffs having contended that the defendants were bound to manage their property so that it does not injure that of other persons (citing *Tarry* v. *Ashton* [3]), negligence or no negligence, Butt, J., said : [4] " Those are cases where the defendants were persons in possession of real property, and with reference to them the rule of law seems to be that they must take care that their property is so used or managed that other persons are not injured, and that, whether their property be managed by themselves or their servants. *The same rule does not apply to the use or management of moveable chattels*" (italics ours). And he held that the defendants were not liable in the absence of proof of negligence.

As Marsden in his *Collisions at Sea* puts it,[5] " A ship is not one of those things dangerous in themselves which entail upon their owners the responsibility of insuring safety." And the same author again says : [6] " The mere fact that a ship strikes or goes foul of and injures another creates no liability in herself, her owners, or those in charge of her."

As Blackburn, J., said in *Rylands* v. *Fletcher*,[7] " traffic on the highways, whether by land or sea, cannot be conducted without exposing those whose persons or

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[1] 6 M. & W. at p. 510.
[2] (1885) 10 P. D. 99.
[3] (1876) 1 Q. B. D. 314.
[4] 10 P. D. at p. 101.
[5] 8th ed. (1923), at p. 43.
[6] At p. 1.
[7] (1866) L. R. 1 Ex. at p. 286.

property are near it to some inevitable risk; and that being so, those who go on the highway, or have their property adjacent to it, may well be held to do so subject to their taking upon themselves the risk of injury from that inevitable danger."

*Railway Trains.*—In the early days of railways frequent attempts were made by injured passengers or the representatives of passengers who had been killed to fix the railway company with a strict liability independent of negligence. One of the most illustrative examinations of these attempts will be found in *Readhead* v. *Midland Railway Company* in 1869,[1] where it was held by the Exchequer Chamber that the company's liability did not amount to a warranty or insurance of safety, but only extended to a duty to take due care to carry the passenger safely—a duty which exists not only in the operation of the train, but in the provision of a train which is as fit for the purpose as human skill and care can make it. The company is not "compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected."[2]

The fact that in passenger cases of this type there is a contract between the two parties, whether the action is framed in contract or in tort, does not render them irrelevant. The existence of the contract does not diminish the company's liability, because it is not suggested that the passenger has consented to the injury. We shall return to them later when we examine the contract of carriage of passengers by aircraft. Meanwhile, we shall pass to a case of injury by a railway train sustained by a person who is not a passenger.

*Caledonian Railway Company* v. *Mulholland*[3] is not precisely in point, but contains a passage worth quoting. The plaintiff, a workman in the employ of one of the

[1] L. R. 4 Q. B. 379. In Leslie, *Law of Transport by Railway* (2nd ed. 1928), the duty is stated as follows (at p. 454): "A carrier of persons owes a duty, which is independent of contract, but may be limited by contract, to persons lawfully in his vehicles, or on his premises, to take due care (including in that term the use of skill and foresight) for their safety."

[2] At p. 393.

[3] [1898] A. C. 216 (a Scottish appeal).

defendants, was killed, as was alleged by his representatives, because the defective brake of a wagon owned by the other defendant, but lent to and operated by the first defendant, refused to act at the critical moment. The House of Lords held that the company owning the defective wagon owed no duty to the deceased to furnish wagons or to examine the wagons lent to the other company, and dismissed the company owning the wagon from the action. " Nor," said Lord Shand,[1] " is it a case in which you can say that the cause of the accident was an instrument noxious or dangerous in itself which might produce an accident from the mere handling of it. It is not a case of that kind, where it may be that wider and other responsibilities might arise." The wagon was not propelled by mechanical power, but was drawn by a horse.

§ 26. *Motor Vehicles.*—Leaving the railway cases for motor vehicles, we find in *Phillips* v. *Britannia Hygienic Laundry Company* [2] an unsuccessful attempt to argue in a Divisional Court of the King's Bench that the owner of a motor lorry was under an " absolute duty " to persons using the highway only to put upon it a vehicle that was free from defects. Owing to a defect in the axle of the defendants' motor lorry a wheel came off while the lorry was being driven in a public highway and damaged the plaintiff's van. He was unable to prove negligence against them or knowledge of the defect, the lorry having only two days previously been returned to them after being overhauled and repaired by a reputable firm. McCardie, J. (in whose judgment Bailhache, J., concurred), following a long chain of authority of highway cases of horse-drawn vehicles, and citing a case of a collision between ships resulting from defective steering-gear,[3] declined to hold the defendants liable in the absence of negligence or knowledge of the defect, and the Court of Appeal affirmed his judgment. " In my view," he

[1] At p. 232.

[2] [1923] 1 K. B. 539; 2 K. B. 832. The suggestion of an absolute duty " seems to have been virtually abandoned in argument before the Court of Appeal."

[3] *The European, supra.*

said,[1] "it is reasonably clear on principle that just as no absolute duty at common law exists as against owners of horses, so no absolute duty exists with respect to motor cars." And he cites with approval Clerk and Lindsell on the *Law of Torts*:[2] "Foremost among the class of case in which, in the absence of wilfulness, negligence is an essential ingredient in liability, come cases of injury caused by chattels which, having been set in motion by the defendant, have come into collision with the plaintiff or his property." A remark by Baron Bramwell,[3] cited by McCardie, J., is also of interest. "For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with such mischief as reasonable care on the part of others cannot avoid."

The decision in the Court of Appeal in *Wing* v. *London General Omnibus Company*,[4] in 1909, deserves our close attention. The plaintiff was a passenger in a motor omnibus owned and operated by the defendants which by skidding on a greasy road and colliding with an electric light standard, injured her as she was alighting. Her claim was based on two grounds, each of which illustrates a rule which is of interest to us. The first ground was the negligence of the defendants' servants in the improper management of the omnibus; the second was "the negligence of the defendants in placing upon the highway a dangerous machine which was liable to become uncontrollable in certain slippery or other conditions of the roadway (which conditions existed at the time the aforesaid injuries were sustained) and thereby creating a nuisance." The first raised the question of *res ipsa loquitur*, the second that of *Rylands* v. *Fletcher*. The fact that the plaintiff was a passenger does not seem to me, in the light of the language used by the members of the Court of Appeal, to confine the *ratio decidendi* of the case to claims by passengers and to exclude its application to other members of the public.

[1] At p. 553.
[2] 7th ed., p. 456.
[3] In *Holmes* v. *Mather* (1875) L. R. 10 Ex. at p. 267.
[4] [1909] 2 K. B. 652.

The first ground can be easily disposed of, and it is convenient to mention it here, although the rule of evidence known as *res ipsa loquitur* has already been discussed.[1] In the words of Fletcher Moulton, L.J. (as he then was) :[2]

> " There was no evidence whatever that the accident was due to negligence on the part of the servants of the defendants who were in charge of the omnibus, unless the mere occurrence of the accident amounts to such evidence. In my opinion the mere occurrence of such an accident is not in itself evidence of negligence. Without attempting to lay down any exhaustive classification of the cases in which the principle of res ipsa loquitur applies, it may generally be said that the principle only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a prima facie responsibility for what happened. An accident in the case of traffic on a highway is in marked contrast to such a condition of things. . . ."

The second ground was in the opinion of the same Lord Justice really based not on negligence but on nuisance, though the word negligence occurred in the statement of claim and in the question put to the jury. " The so-called negligence of the defendants, in allowing their omnibus to run when the roads were in a greasy state, must mean that they ought not to have done so because, when run, the omnibus constituted a nuisance." [3] He then continued as follows :

> " This cause of action is of the type usually described by reference to the well-known case of *Rylands* v. *Fletcher*. For the purposes of to-day it is sufficient to describe this class of actions as arising out of cases where by excessive use of some private right a person has exposed his neighbour's property or person to danger. In such a case should accident happen therefrom, even through the intervention of an event for which he is not responsible, and without negligence on his part, he is liable for the damage. The best known cases of this type are associated with the use by a person of land belonging to

[1] See pp. 50–52.
[2] At pp. 663, 664.
[3] At p. 665.

him, as when a man collects a large volume of water on his land, or carries on some dangerous manufacture there. But I have no doubt that analogous causes of action exist when a member of the public makes undue and improper use of the right which he enjoys in common with all others of using the public highways for traffic. If a man places on the streets vehicles so wholly unmanageable as necessarily to be a continuing danger to other vehicles, either at all times or under special conditions of weather, I have no doubt that he does it at his peril, and that he is responsible for injuries arising therefrom, even though there has been no negligence in the management of his vehicle."

The learned Lord Justice then pointed out [1] that no evidence had been given

" to prove either that this particular motor omnibus was or that motor omnibuses generally were unmanageable, or dangerous, to such an extent as to constitute a nuisance in the eye of the law, or to call into play the doctrine of *Rylands* v. *Fletcher*. For the reason I have already given, the mere occurrence of the accident is not evidence of negligence, much less of the more difficult issue of nuisance, and beyond this there was no relevant evidence of any kind. . . .

" There [2] is nothing which points to any of them being so unsuitable for use in street traffic as to constitute a nuisance, and no jury is entitled mero motu to pronounce that a vehicle such as a motor omnibus is a nuisance without proper evidence. Thousands of motor omnibuses travel in the streets of London in all weathers, and they carry a considerable portion of the passenger traffic of London. They are recognized by the authorities, and duly licensed to carry passengers. The number of car miles annually run by them must amount to many hundreds of thousands, if not millions. The number of accidents which occur must be small compared with the extent of their use. In the absence of evidence the jury could not properly pronounce motor omnibuses generally to be unfit for street traffic, and a nuisance, and there was no attempt to shew that this motor omnibus was not a properly constructed motor omnibus. The judge acted rightly, therefore, in declining to accept the verdict of the jury on this issue.

" Thus far I have dealt with the question of nuisance as though the plaintiff had been a member of the public using

[1] At p. 666.
[2] At p. 667.

the public highway, and injured by a vehicle travelling thereon. But in fact the plaintiff was a passenger by the motor omnibus. This fact, no doubt, alters the rights of the plaintiff, but not in any way to the advantage of her case."

Accordingly, Lords Justices Vaughan Williams and Fletcher Moulton upheld the decision of the county court judge in favour of the defendants. Lord Justice Buckley dissented on the ground that there was evidence entitling the jury to find, as they had found, that the defendants were negligent in allowing their omnibuses to run in the existing state of the roads, but he said that there was no difference of opinion amongst the members of the court as to the law.

The length of the quotations will, I think, be excused by reason of the closeness of this decision to our problem; moreover, the decision to my mind is of value as showing the dividing line between *res ipsa loquitur*, which is a rule of evidence, and *Rylands* v. *Fletcher*, which is a principle of liability. One cannot help regretting that the court did not examine more closely the question of the nature of those things to which *Rylands* v. *Fletcher* is applicable. At first sight it might seem that Lord Justice Fletcher Moulton was prepared to admit into that category a dangerous machine which is liable to "escape" from control.[1] I incline to doubt, however, whether that would be a true interpretation. I do not think he means that motor omnibuses upon a greasy road are analogous to escaping gas, fire, electricity, poison, etc. I suggest that what he means is that the *Rylands* v. *Fletcher* type of cases represents one kind of nuisance, and cases of abuse of the highway are another kind of nuisance,[2] and that the two kinds have this point in common that it is not necessary for the plaintiff to prove negligence. That is a different thing from saying that motor omnibuses on greasy roads are, in a legal sense, "dangerous things."[3] This seems to me to be the view of the case taken by McCardie, J., in *Phillips*' case discussed above, when he says:[4]

[1] See the last ten lines on p. 665.
[2] See Clerk and Lindsell, *Law of Torts* (8th ed., 1929), at p. 360.
[3] See note (*f*) by Stallybrass in Salmond, at p. 373.
[4] [1923] 1 K. B. at pp. 554, 555.

" In the case of a motor car, however, there is nothing at common law which prevents it from being run on a highway, subject to liability for negligence and nuisance. . . . Secondly, it was suggested that the defendants' lorry must, having regard to the defective axle, be regarded as a nuisance. Now it is plain that a motor car is not in itself a nuisance, though liable to skid in wet weather : see *Wing* v. *London General Omnibus Co.*"

The net effect of the motor vehicle cases may be summed up in the words of Lord Justice Atkin (as he then was) in *Hambrook* v. *Stokes* : [1]

" The duty of the owner of a motor car in a highway is not a duty to refrain from inflicting a particular kind of injury upon those who are in the highway. If so, he would be an insurer. It is a duty to use reasonable care to avoid injuring those using the highway."

The conclusion which I venture to submit is that an aircraft is not at common law a " dangerous thing," so as to attract the rule of strict liability. I can see no more reason why it should be placed in that category than a mechanically propelled vehicle on a highway.[2] Nor is an aircraft in its passage over the land of another *per se* a nuisance. But these statements do not commit us to the assertion that in no circumstances can an aircraft

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[1] [1925] 1 K. B. at p. 156 ; cited in Gibb, *Law of Collisions on Land* (3rd ed. 1932), at p. 4. See also *ibid.*, p. 1 :

" In order that one person may succeed in an action against another for damage done to the plaintiff himself or to his property by reason of a collision with the defendant or his vehicle, it is essential to show that the collision was caused by the negligence or wilfulness of the defendant or those for whom he is responsible, or by the defendant's having put upon the road something which constitutes a nuisance. Where collision results from an act neither wilful nor negligent, there is no remedy for the damage suffered."

[2] Paraphrasing the words of Fletcher Moulton, L.J., quoted above (p. 61), we might say that in Great Britain alone hundreds of aircraft fly in all weathers and carry a considerable passenger traffic, especially across the Channel. " They are recognized by the authorities and duly licensed to carry passengers." The number of miles annually flown by them runs into hundreds of thousands. " The number of accidents which occur must be small compared with the extent of their use."

In *Hamilton* v. *Bennett*, *Times* newspaper, February 12, 1930, and 74 *Solicitors' Journal*, p. 122, in which the Court of Appeal upheld a finding of fact by a county court judge to the effect that lessons in flying were not necessary for the infant defendant and not for his benefit, Scrutton, L.J., is reported to have remarked that " a very great responsibility was incurred by those who taught a boy to fly without the knowledge and consent of his parents."

become a nuisance. On the contrary, as we have already seen,[1] there are many circumstances in its behaviour which may cause it to be a nuisance.

§ 27. *Liability Based on Negligence, not on mere Ownership.*—There is another analogy which may be drawn from land vehicles and from ships and may be applied to aircraft, namely, that at common law the liability of an owner for damage caused by his vehicle is based not upon ownership but upon the negligence of persons for whose conduct he is responsible. As Lord Cairns, L.C., said of a ship which struck and damaged a pier :[2]

> " By the Common Law, if a pier were injured by a ship sailing against it, the owner might be liable if he was on board and directing the navigation of the ship, or if the ship was navigated by persons for whose negligence he was liable. But the owner would not be liable merely because he was the owner, or without shewing that those navigating the vessel were his servants."

Lord Blackburn puts the matter even better, from our point of view, because more widely :[3]

> " The Common Law is, I think, as follows : Property adjoining to a spot on which the public have a right to carry on traffic is liable to be injured by that traffic. In this respect there is no difference between a shop, the railings or windows of which may be broken by a carriage on the road, and a pier adjoining to a harbour or a navigable river or the sea, which is liable to be injured by a ship. In either case the owner of the injured property must bear his own loss, unless he can establish that some other person is in fault, and liable to make it good. And he does not establish this against a person merely by shewing that he is owner of the carriage or ship which did the mischief, for the owner incurs no liability merely because he is owner.
>
> " But he does establish such a liability against any person who either wilfully did the damage, or neglected that duty which the law casts upon those in charge of a carriage on land,

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[1] See p. 41.

[2] *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. at p. 751. See also *Hibbs* v. *Ross* (1866) 1 Q. B. 534.

[3] At p. 767. I submit that the decision of the House of Lords in *Great Western Railway Co.* v. *Owners of S.S. Mostyn* [1928] A. C. 57, does not impair the value of these statements of the common law by Lord Cairns, L.C., and Lord Blackburn.

and a ship or a float of timber on water, to take reasonable care and use reasonable skill to prevent it from doing injury, and that this wilfulness or neglect caused the damage. And, if he can prove that the person who has been guilty of either, stood in the relation of servant to another, and that the fault occurred in the course of the employment, he establishes a liability against the master also."

There are other sets of circumstances in which the owner of an aircraft might be held liable for damage done by his aircraft while being flown by another person : (i) in cases of the type of *Pratt* v. *Patrick*,[1] where the owner is present in the aircraft though not actually operating it, and is in a position to control a friend who is the operator ; (ii) (possibly) in cases of the kind known in the United States as the " family automobile " case, where the owner of a car, though not himself present, is held liable for the negligence of some member of his family who is driving the car for family purposes, though it is believed that English law has not yet gone as far as that ;[2] and (iii) (possibly) in cases where the owner negligently leaves his aircraft in a place where he knows, or ought to know, that some unauthorized person is likely to enter and start it, which in fact happens with damage resulting from the latter's negligence.[3]

## SUMMARY OF RELEVANT PRINCIPLES OF COMMON LAW

§ 28. It is convenient at this stage, before we turn to examine the Air Navigation Act of 1920, to summarize the conclusions which we have drawn from an examination of the common law.[4]

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[1] [1924] 1 K. B. 488, and *Samson* v. *Aitchison* [1912] A. C. 844 (P. C.); *Parker* v. *Miller* (1926) 42 T. L. R. 408, goes further, for there the owner of the car was not present and had lent his car to a friend whose negligence had caused the damage.

[2] See an article by Lattin in *Michigan Law Review*, xxvi. (1928), pp. 846–879.

[3] *McDowall* v. *Great Western Railway Co.* [1902] 1 K. B. 618 ; [1903] 2 K. B. 331.

[4] Some account of the state of the law in the United States of America will be found in an article by Newman on *Damage Liability in Aircraft Cases* in *Columbia Law Review*, xxix. (1929), pp. 1039–1051, and in the American works mentioned in the List of Books on p. xi.

(1) The mere passage of an aircraft over my land at a height and in such circumstances as to cause no interference with the reasonable use and enjoyment of it and structures upon it does not afford me an action of trespass.

(2) The passage of an aircraft over my land at a height and in such circumstances as to cause interference with the reasonable use and enjoyment of it and structures upon it affords me an action of nuisance,[1] but probably not an action of trespass unless the aircraft comes into contact with the land or something attached to it.

(3) An aircraft, either at rest or in flight, does not belong to the category of things dangerous *per se*, and an action against the person responsible for it for damage done by it must be based upon negligence, except when trespass or nuisance lies.

(4) In an action based upon negligence the rule of evidence known as *res ipsa loquitur* probably applies.

[1] The annual report for 1929 of the Director of Aeronautics of Ohio cites the unusual case of complaint that " a fox farm has been damaged last year in excess of one hundred thousand dollars because of the circling of air planes low over the fox farm. The female foxes which are highly excitable at all times in their efforts to protect their pups from the supposed danger, either smothered them or choked them to death in carrying them too far by the neck. In the northern part of the state an air port has been placed next to a private game preserve. Aircraft flying low over the marshes frightens away all the game. Either the air port or the game preserve must be abandoned " ; cited by Tuttle and Bennett in *Cincinnati Law Review*, vol. v., No. 3.

# CHAPTER 4

## STATUTORY LIABILITY OF OWNERS OF AIRCRAFT FOR DAMAGE

§ 29. We now stand on the threshold of the Air Navigation Act, 1920. The necessity of the preceding examination of the common law has been explained,[1] namely, that the statute is, as it were, a palimpsest with the common law as its background, and that, as we shall see, the statute does not apply to all aircraft and in all circumstances. We shall summarize at the end of this chapter the circumstances in which the immunity provisions of the statute do not apply.

*The Compromise Contained in Section* 9.—The principal provisions in the Act of 1920 relevant to the question of the liability of owners of aircraft for damage to person or property [2] are as follows :

> Section 9 (1). " No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reasonable, or of the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with ; but [3] where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause

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[1] On pp. 10–12.

[2] Other than the person or property of passengers or other property being carried, which is dealt with in Chapter 6.

[3] The American Uniform State Law of Aeronautics, which has been adopted with or without modifications by more than 20 States, contains in section 5 a provision not unlike what follows in section 9 of our Act relating to material loss or damage : see Zollmann, *Cases*, p. 486.

of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered . . ."

Section 18 (1). "This Act shall not apply to aircraft belonging to or exclusively employed in the service of His Majesty:

"Provided that His Majesty may, by Order in Council, apply to any such aircraft, with or without modification, any of the provisions of this Act or of any orders or regulations made thereunder."

The effect of section 9 may be summarized by saying that neither trespass nor nuisance will lie in regard to a flight which is reasonable in all the circumstances and is conducted in compliance with the law, but an absolute liability is imposed upon the owner for material damage or loss caused by an aircraft in flight, taking off or landing, or by articles falling from it. We must now consider it in detail.

Section 18 places an important limitation upon the operation of section 9. It would seem that, as a result of section 18, section 9 has no operation in the case of aircraft of any kind belonging to His Majesty's Navy or Army or Air Force, or of aircraft exclusively employed in the civilian or other service of the Crown, as, for instance, in the carriage of mails or Prime Ministers. It would seem also that the aircraft used by members of the University Air Squadrons which exist at Oxford and Cambridge, and probably elsewhere, are in the same position because they belong to His Majesty. Further, this section applies whether the aircraft belonging to or exclusively employed in the service of His Majesty belong to or are employed by him in his official or in his private capacity. It is perhaps unnecessary to add that section 18 does not apply to aircraft belonging to other members of the Royal Family or to aircraft in their employment unless owned by the Crown. When the section states that the Act "shall not apply to aircraft" of the kinds mentioned, we understand it to mean, so far as liability is concerned, that the liability of owners or navigators or persons in such aircraft is

neither increased or decreased by the provisions of the Act.[1]

So far no Order in Council has been made under section 18. Accordingly it will be understood that the remarks which follow in this chapter do not apply to the aircraft mentioned in that section, unless it is otherwise stated.

Before, however, we are in a position to examine the meaning of section 9 we must deal with the preliminary questions of the scope of application of the Act of 1920, and, more particularly, of sections 9 and 18.[2]

§ 30. *The Local Scope of Application of the Air Navigation Act*, 1920, *and particularly of Section* 9.—The general principle governing the extent of the application of a British Act of Parliament [3] is that *potentially* it may apply to British subjects wherever they may be, and to foreign subjects when they are within the King's dominions, including national [4] (that is, inland or internal) and territorial waters. *Actually* the scope of its application may be confined by its provisions and the nature of the matters dealt with by them within narrower limits. There is no legal reason why provisions as to the liability of owners of aircraft should not apply wherever aircraft can go ; the question remains whether the words employed give those provisions so wide a scope.

Two clauses must be quoted from the preamble to the Act :

> " Whereas the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto."

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[1] As regards remedies against the Crown and Government Departments and officials for wrongs of a tortious nature, see Salmond, pp. 71–74 ; Wade and Phillips, *Constitutional Law* (1931), pp. 230–233 ; and, as regards the Air Council, *Mackenzie-Kennedy* v. *Air Council* [1927] 2 K. B. 517.

[2] In this chapter we are concerned with the question of the liability of the owner of aircraft for damage, and therefore primarily with sections 9 and 18 : the scope of application of other provisions contained in the Act will be considered in due course.

[3] It is unnecessary to discuss here the effect of an Imperial Statute within the British Self-Governing Dominions and India, as the Act under discussion does not apply to those countries, except in so far as it may have been adopted by local legislation.

[4] For the distinction between national and territorial waters, see Oppenheim, vol. i., § 172.

This recital, which looks both upwards and outwards, seems to me to be intended mainly for foreign consumption. The basis of the Act of 1920 is the Convention of 1919, and this recital places on record the triumph in the Convention of the theory of sovereignty in the air space over the competing theories which had been under discussion.[1] In substance, it repeats the first article of the Convention which reads as follows :

> " The high contracting parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory. For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the Mother Country and of the colonies, and the territorial waters adjacent thereto."

If the recital above quoted from the Act stood alone, I should not consider that it necessarily extended the operation of section 9 to British territorial waters, because it seems to me more in the nature of an assertion as against foreign States of sovereignty in the national air space. The following recital is, however, somewhat more domestic :

> " And whereas it is expedient to make further provision for controlling and regulating the navigation of aircraft, whether British or foreign, within the limits of His Majesty's jurisdiction as aforesaid, and, in the case of British aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere."

Section 9 applies not only to England and Wales, but also to Scotland (see section 19 (1)) and to Northern Ireland (see section 19 (2)). Under section 4 the Crown has power by Order in Council to extend the operation of section 9 to any " British possessions " other than the Self-Governing Dominions and India and to any " territory under His Majesty's protection." In pursuance of this power Orders in Council have been made extending the operation of certain sections of the Act, including section 9, to most of the Crown colonies, protectorates and mandated territories.[2]

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[1] See Chapter 1 above, pp. 2, 3.

[2] See the following Orders published in Statutory Rules and Orders : Air

The position of the Self-Governing Dominions may be summarized by saying that in the Irish Free State the Act of 1920 is in force subject to certain modifications (not affecting section 9) made by the Air Navigation (No. 1) Regulations, 1928; the other Dominions and India have passed their own legislation which does not include provisions similar to those of section 9, except in the case of South Africa, whose Aviation Act of 1923 reproduces that section almost textually.[1]

Clause 2 of the Consolidated Order made under the Act provides that

> " The provisions of this Order apply (unless the contrary intention appears)—
>
> (*a*) to all British aircraft registered in Great Britain and Northern Ireland wherever such aircraft may be;
>
> (*b*) to other British aircraft and foreign aircraft when such aircraft are in or over Great Britain and Northern Ireland. . . ."

But we are at present considering the scope of section 9 of the Act, not the scope of the Order, which does not specifically deal with liability to third parties.

§ 31. *The Interpretation of Section* 9.—When we turn to examine the wording of section 9, we find that it applies to the flight of aircraft " over any property at a height above the ground which, etc." What is meant by " ground "? What is meant by " property "? " Ground " is defined in the *Concise Oxford Dictionary* as " bottom of sea (now chiefly figurative, as touch ground, come to something solid after vague talk, etc.; of ship, take ground, strand) " . . . surface of earth (fall, be dashed, to the ground) "; and the word occurs in such compounds as " ground-fish, living at bottom, ground-torpedo, fixed to bottom of sea," etc.

Coke[2] tells us that: " Land, in the legall signification, comprehendeth any ground, soile or earth

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Navigation (Colonies and Protectorates) Order in Council, 1922, S. R. & O. [1922], No. 121; Air Navigation (Mandated Territories) Order in Council, 1927, S. R. & O. [1927], No. 1244; S. R. & O. [1927], No. 1245; S. R. & O. [192 ], No. 90; S. R. & O. [1931], No. 972.

[1] As to Canada, see *In re The Regulation and Control of Aeronautics in Canada* [1932] A. C. 54.

[2] Co. Litt. 4*a*.

whatsoever; as meadows, pastures, woods, moores, waters. . . ." Blackstone uses similar language,[1] and tells us that the correct method of bringing an action to recover a pool of water is to describe it as " land covered with water. For water is a moveable, wandering thing, and must of necessity continue common by the law of nature." We need, I think, have no hesitation in saying that the use of the word " ground " in section 9 is not confined to dry land. But that does not conclude the matter.

Section 9 (1) contains the word " property " twice, firstly, in its disabling part, " flight of aircraft *over any property* at a height above the ground which . . .," and secondly, in its enabling part, " damage or loss is caused . . . to any person *or property* on land or water."

I confess that I find it difficult to say whether the words " over any property " have a limiting effect or not. Do they constitute a condition of the applicability of the immunity from the two kinds of action mentioned? Or are they merely descriptive, meaning that, unless the aircraft was passing over " property," no question of an action for trespass or nuisance could arise? Does " over any property " mean flight over immovable property, that is, land (whether covered or not by water) which is capable of being and normally is the subject of ownership by some person, whether the Crown or a private individual? Or does it include movable property, for instance, ships, so that the subsection applies wherever ships may go? Or must there be a ship under the aircraft at sea?

The expression " person or property on land or water " is not free from ambiguity. It certainly includes a ship even on the high seas, and it is clearly intended to include land and structures upon it though it is more appropriate to the structures than to the land itself.

It is true that the disabling and the enabling parts of this subsection are logically distinct and could have been embodied in different subsections. On the other hand, they represent a compromise or bargain which can be

[1] *Commentaries*, vol. ii., ch. 2, p. 18.

summed up as establishing no liability for theoretical legal injury (if any), but absolute liability for actual material injury, so that it is difficult to argue that " property " means one thing in the first part and another in the second. I incline to the view that the expression " over any property " does not limit the scope of the scope of the immunity to dry land and national waters,[1] and that the immunity applies equally to aircraft navigating the high seas and territorial waters whether the flight may be " over " a ship or not.[2] I think that in both expressions " property " includes both real and personal property.

As to the aircraft concerned, section 9 seems to me to apply to (i) all aircraft registered in Great Britain or Northern Ireland,[3] wherever they may be, and (ii) all other British aircraft and all foreign aircraft while in or over Great Britain [3] or the territorial waters appurtenant thereto; but (*a*) as the result of section 18 it does not apply to aircraft " belonging to or exclusively employed in the service of His Majesty," whatever their nationality, and (*b*) nothing contained in it enables an action to be

[1] That is, lakes, canals, rivers, river mouths, ports and harbours.

[2] With some diffidence attention must be drawn to the bare possibility that the words " over any property " have the effect of excluding from the scope of section 9 aircraft when they are over the territorial waters of the high seas. (i) As regards territorial waters, the preamble of the Territorial Waters Jurisdiction Act, 1878, asserts " jurisdiction " over these waters in the Crown, and it is controversial amongst international lawyers whether the rights of a littoral State over these waters are those of sovereignty or merely those of jurisdiction and control for purposes of police, national defence, etc. Even if they do amount to sovereignty (*imperium*), I do not think they amount to property (*dominium*), and the law of England does not recognize that either the Crown or a private subject can be *dominus* of any portion of British territorial waters. It is probable that both the surface and the subsoil of the sea-bed of territorial waters is capable of being owned by the littoral State and by individuals, but it is difficult to believe that the immunity of section 9 depends upon the accident of the ownership or non-ownership of the particular piece of sea-bed or subsoil over which the aircraft happens at the moment to be (see Oppenheim, vol. i., §§ 185, 190 *b*).

(ii) As regards the high seas, there can be no ownership either by a State or by individuals, but it is probable that both the surface and the subsoil of the sea-bed are capable of being owned by a State and by individuals (see Oppenheim, vol. i., §§ 287 *bb* and 287 *c*). Here again I do not think that the immunity of section 9 can depend upon the accident of ownership or non-ownership.

I prefer the more common-sense, if looser, view, that the words " over any property " are not restrictive but descriptive, by which I mean that they describe the presence of a factor (namely, underlying property) in the absence of which it is unlikely that an action would be brought or the immunity pleaded.

[3] Including Crown Colonies, protectorates, and mandated territories to which the Act may have been extended.

brought against a foreign State as owner or charterer of, or as being otherwise in control of, an aircraft; this State immunity being based upon the principles of International Law as interpreted by British courts in the case of ships.[1]

Having disposed of these preliminary questions, we are now in a position to examine the nature of the immunity conferred, and of the liability imposed, by section 9 in respect of the aircraft to which it applies. It will be convenient to follow as far as possible the order of treatment adopted in the preceding chapters. It has already been noted that section 9 (1) contains both disabling and enabling provisions.

## THE NEW STATUTORY IMMUNITY

§ 32. *Trespass and Nuisance.*—So long as the provisions of the Act and any Order in Council made thereunder and of the Convention of 1919 are duly complied with, no action of trespass or nuisance will lie against any person by reason only of the flight of any aircraft or of[2] the ordinary incidents of such flight, provided that the aircraft is flying " at a height above the ground which having regard to wind, weather, and all the circumstances of the case is reasonable." [3]

Among " the circumstances of the case " is presumably included the fact that the aircraft has recently taken off or is preparing to land; clearly an altitude which would be reasonable in those circumstances might be unreasonably low when the aircraft is in full flight.

" The ordinary incidents of such flight " probably means the ordinary consequences of the normal behaviour

[1] See Oppenheim, vol. i., § 451 *a*.

[2] The word " of " seems to have been omitted before the words " the ordinary incidents of such flight " in this section.

[3] In 1926 an action was brought by the proprietors of a girls' school near Brighton against an aviation company and one of its pilots claiming damages for, and an injunction to restrain, " nuisance " and " trespass " committed by the defendants in instituting a service of aeroplane pleasure trips involving constant and very low flying over the plaintiffs' buildings and grounds. After an application for an interim injunction, negotiations took place between the parties and the defendants submitted to a perpetual injunction in terms which severely restricted flying over or near the plaintiffs' land. (*Roedean School, Limited* v. *Cornwall Aviation Co., Limited and Phillips* (Record No. 1926, R. No. 1262). Unreported, apart from *The Times*, July 3, 1926.)

of an aircraft; for instance, a certain amount of noise is inevitable; a certain invasion of privacy, whereby persons in the aircraft can see things on the surface of the land which are normally hidden from the public view, is inevitable. We can leave the maxim *de minimis non curat lex* [1] to take care of such transient annoyances as interference with light and pollution of air. The occupier of land must submit to these "ordinary incidents" in return for the statutory right of action which the enabling part of the section gives him.

How are we to deal with any deviations from a reasonable height and any extraordinary "incidents" which are necessitated by emergency? An aircraft gets into mechanical difficulty of some kind for which the owner is in no way responsible, and, either with or against the volition of the pilot, passes over my house a few yards above the chimneys. The scope of the common law justification of "necessity" is ill-defined. It is regarded by Sir Frederick Pollock as a "general exception," and he says: [2] "A class of exceptions as to which there is not much authority, but which certainly exists in every system of law, is that of acts done of necessity to avoid a greater harm, and on that ground justified." He mentions [3] as justifications for an entry on land such causes as "the necessity of self-preservation, or the defence of the realm," and there is some slight judicial authority for the view that the saving of human life justifies an act which would otherwise be a trespass.[4] I suggest, therefore, that, either upon the ground of necessity or upon the ground that the low altitude was reasonable in "all the circumstances of the case," an English court would not have much difficulty, so far as concerns the common law, in finding for the defendant in an action for trespass or nuisance in the case put above.[5] Intention is not an essential ingredient in the

[1] See Broom, *Legal Maxims* (9th ed., 1924), p. 100.
[2] *Op. cit.*, p. 174.
[3] *Ibid.*, at p. 409.
[4] See, for instance, Y.B. 37 Hen. 6, Trin. f. 37, pl. 26 (cited in Bigelow, *The Law of Torts* (3rd ed., 1908), p. 320).
[5] It is interesting to notice article 27 of the "Regulations for Preventing Collisions at Sea": "In obeying and construing these rules, due regard shall be had to all dangers of navigation and collision, and to any special circumstances

tort of trespass, but volition is. I am liable to you if I walk upon your land believing it to be my own or subject to a public right of way; but if I am tossed by a bull, or am thrown as the result of the impact of a collision for which I am in no way to blame, over a fence on to your land, I am not liable because my presence there is involuntary. I believe that the same is true of nuisance.

*Negligence.*—The first and disabling part of subsection 1 of section 9 excludes actions for trespass and nuisance, but does not mention negligence. The reason, I think, is clear. Proof of actual damage is essential to an action of negligence or, if the expression is preferred, an action upon the case for damage resulting from negligence. The flight " only " of an aircraft at a reasonable height might constitute a nuisance, and it is arguable—though erroneously, it has been submitted in a preceding chapter —that it might amount to trespass, but it is unlikely to be productive of actual damage. It is therefore not surprising to find no mention of negligence until we come to the enabling provisions which afford a remedy for " material damage or loss."

§ 33. *The effect of non-compliance with the Act or Orders in Council made thereunder or the Convention of* 1919.—The words of section 9 are absolute on this point: " so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with." The expression does not suggest the necessity of any causal connection between the non-compliance and the trespass or nuisance complained of. Must any such connection exist?

Let us look at some of the requirements. Some of them are directly connected with safety, for instance, the " General Safety Provisions " contained in article 9 of the Consolidated Order: [1]

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which may render a departure from the above rules necessary in order to avoid immediate danger " (Marsden, p. 425). Compare article 34 of Annex D of the Convention of 1919, enacted in article 34 of Schedule IV. of the Consolidated Order in the following terms:

" § 34. In conforming with these rules, due regard shall be had to all dangers of navigation and collision and to any special circumstances which may render a departure from the above rules necessary in order to avoid immediate danger."

[1] Hereinafter also referred to as C.O.

9. (1) " An aircraft shall not fly over any city or town within Great Britain and Northern Ireland except at such altitude as will enable the aircraft to land outside the city or town should the means of propulsion fail through mechanical breakdown or other cause :

" Provided that this prohibition shall not apply to any area comprised within a circle with a radius of one mile from the centre of a licensed aerodrome of a Royal Air Force aerodrome or of an aerodrome under the control of the Secretary of State.

(2) " An aircraft in or over Great Britain and Northern Ireland shall not—

(*a*) be used to carry out any trick flying or exhibition flying over any city or town area or populous district ; or

(*b*) be used to carry out any trick flying or exhibition flying over any regatta, race meeting, or meeting for public games or sports, except where specially arranged for in writing by the promoters of such regatta or meeting ; or

(*c*) be flown in such circumstances as, by reason of low altitude or proximity to persons or dwellings or for any other reason, to cause unnecessary danger to any person or property on land or water."

On the other hand, a pilot or a passenger lights a cigarette (article 9 (3) of C.O.) and before he has finished it serious engine trouble develops. An unauthorised photograph is taken from the aircraft (article 11 of C.O.). The certificate of airworthiness is not " in the pocket of the journey log-book " (article 16 of C.O.). A necessary document is forged (article 24 of C.O.).

Are we to say that a breach of a requirement having no connection with the trespass or nuisance deprives the owner of an aircraft of the exemption conferred upon him from actions of trespass or nuisance conferred by section 9 of the Act ? I think the answer must be in the affirmative. The result may seem harsh. But we are not dealing here with the question whether a breach of the Act of 1920 or of the Consolidated Order confers a right of action upon a person injured or merely exposes the offender to penalties ; that is a different question which will be discussed later. We are dealing with the specific question whether the owner of an aircraft can

claim the benefit of a statutory exemption from a liability which would otherwise exist, and I submit that a court can only deny to a plaintiff his common law rights when the defendant has strictly complied with the conditions of his statutory exemption.[1] This is one of the sanctions created by Parliament for the enforcement of the Act and the Orders made thereunder and the Convention on which it is based.

But we must be on our guard against saying that, because there has been a non-compliance, therefore an action of trespass or of nuisance exists. The section does not say or mean that. It means that if the necessary conditions of the common law action of trespass or nuisance in respect of the flight are present, then the action will lie unless the provisions of the Act and any Orders in Council made thereunder and the Convention have been duly complied with.

" Duly complied with " by whom ? By the defendant, or by every person concerned ? It may happen that an action is being brought against a defendant, for instance, a pilot, who is not the owner of the offending aircraft ; the defendant may have " duly complied with " everything necessary, but the owner may not have done so. Alternatively, it may happen that an action is being brought at common law against an owner when the aircraft was being operated by some person for whom he is responsible and who has not " duly complied with " everything necessary. In either case, I think that the defendant is unable to claim the immunity of the section. " Duly complied with " means, I incline to think, compliance by every person whose statutory duty it was to comply with everything necessary in relation to this aircraft and this flight.

## THE NEW STATUTORY TORT

§ 34. There are many instances of statutory torts. They comprise rights of action expressly conferred by statute and rights of action which arise by implication

[1] See Maxwell, *Interpretation of Statutes* (7th ed., 1929), p. 245, for some cases.

from breach of a statutory duty. We are now concerned with an instance of the first class; with the second we deal later.[1]

The enabling part of subsection 1 of section 9 creates a statutory right of action for "material damage or loss . . . caused (*a*) by an aircraft in flight, taking off, or landing, or (*b*) by any person in any such aircraft, or (*c*) by any article falling from any such aircraft . . . without proof of negligence or intention or other cause of action . . ." The "material damage or loss" must be caused "to any person or property on land or water." It seems probable that "water" is not confined to national (or inland or internal) waters, but comprises also territorial waters and the high seas, so that damage caused by a British registered aircraft in mid-Atlantic is recoverable under this provision.[2]

Moreover, it will be noticed that the existence of this new statutory remedy is not made dependent upon compliance with the Act and Orders made thereunder and the Convention. It would, of course, be absurd if it were made thus conditional in the same way as the new statutory defence created by the same section. But it seems worth while pointing out that while the new statutory defence is only available in respect of certain aircraft complying with certain conditions, the new statutory remedy is available where "material damage or loss caused by *an* aircraft in flight, taking-off, or landing, or by any person in *any* such aircraft, or by any aircraft falling from *any such* aircraft." How comprehensive is the incidence of the liability? On the one hand, aircraft "belonging to or exclusively employed in the service of His Majesty" are excluded by section 18 of the Act. Apart from that, I suggest that the only limit (apart from limits imposed *ratione personae* such as the governmental or diplomatic immunity of the defendant) is to be found in the limits of the jurisdiction of the British court in which the action is brought. That is to say, the remedy is available (*a*) when the loss or damage occurs within the United Kingdom

[1] See pp. 83–85.
[2] See pp. 72, 73.

whatever may be the nationality of the aircraft, and whether or not it has a nationality, and (*b*) when the loss or damage occurs abroad, only where it is wrongful [1] by the *lex loci*, in the same way that a defendant could be sued in England for an injury committed by him in France if it is both actionable in England and wrongful [1] in France. But we must not anticipate the later chapter on Jurisdiction.

*The Plaintiff.*—The action may be brought by the person who sustains personal injuries, or by a person who stands in such relation to the person or property to which "material damage or loss" is caused as would in accordance with the principles of the common law entitle him to bring an action; for instance, certain relatives within the provisions and subject to the conditions of the Fatal Accidents Acts; or a husband in respect of the loss of the society or services of his injured wife who is not killed instantaneously,[2] or a master in respect of the loss of services of an injured servant who is not killed instantaneously; [3] or the occupier of land and buildings and, in case of permanent injury as "material damage or loss" will usually be, the reversioner; [4] or the possessor of personal chattels or in certain circumstances the reversioner.

*The Defendant.*—(*a*) The action lies against the owner of the aircraft, whether or not he was responsible for the aircraft at the material time, but under the proviso contained in section 9 (1) in the case of "damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment," *e.g.* a charterer or a friend to whom the aircraft was lent gratuitously, the owner has a right of indemnity against that person, and may join him as a defendant in the action. Or (*b*) under section 9 (2) the action may lie against a person to whom the "aircraft has been bona fide demised, let, or hired out for a period exceeding fourteen days," provided that

[1] For the meaning of this term, see *Phillips* v. *Eyre* (1870) L. R. 6 Q. B. 1; *Machado* v. *Fontes* [1897] 2 Q. B. 231.
[2] Salmond, pp. 513, 514.
[3] *Ibid.*, pp. 511, 512.
[4] *Ibid.*, pp. 339-343.

" no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner." It will be noticed that the maritime analogies of an action *in rem* against the ship and of the limitation of liability to a sum measured by registered tonnage are not followed.

In view of the fact that the liability created by section 9 is based upon ownership of the aircraft, the group of decisions [1] of the type known in the United States as the " family automobile " case do not require to be invoked ; but they would seem to be relevant to an action at common law which is not precluded by the disabling part of section 9.

§ 35. *Defences.*—Damages are recoverable in respect of damage or loss " without proof of negligence or intention or other cause of action, as though the same had been caused by his [the owner's] wilful act, neglect or default. . . ." Let us consider some of the available defences :

(*a*) In the words of the section, *that the damage or loss was* " caused " *by the negligence of the party by whom the same was suffered ;* for instance, the driver of a car inside an aerodrome who by negligent driving collides with an aircraft in process of taking-off.

(*b*) In the words of the section, *that the damage or loss was* " contributed " *to by the negligence of the person by whom the same was suffered.* This is presumably an attempt to reproduce the common law defence of " contributory negligence," namely, that the damage or loss was not caused solely by the defendant and that it would not have occurred if the plantiff had not himself been negligent.[2]

(*c*) *Volenti non fit injuria.*—Has this defence any scope ? I incline to think that it has. It is no defence to an action for breach of a statutory duty,[3] but the action under

[1] See above, p. 65.

[2] See Salmond, pp. 35–54. See Beven, p. 788, on the essential character of the plea of contributory negligence.

[3] *Digest of English Civil Law*, 2nd ed., 1921 (by Edward Jenks, this title being by Sir J. C. Miles), § 913 ; *Baddeley* v. *Earl Granville* (1887) 19 Q. B. D. 423. For a very questionable invocation of this doctrine against a passenger by air, see later, p. 128, note (3).

discussion, though the creature of statute, is not for breach of statutory duty. Suppose that an exhibition of flying is being given at a place where it is lawful within the provisions of article 9 (2) of the Consolidated Order and the plaintiff knows that certain risky experiments are to be made with a new type of machine, or that certain dangerous manœuvres are to be performed, it is at least arguable that he consents to the risk run by spectators and has no action if he is injured while looking on.

(*d*) *That the action is barred by the lapse of six years between the date of its accrual and of the issue of the writ.* —The Act of 1920 specifies no period of limitation, and therefore the statutory tort falls under the provisions of the Limitation Act, 1623.[1] It would be out of place to state here the general conditions of the limitation of actions, for instance, as to disabilities, but it may be convenient to mention the shorter period of six months in the case of a defendant who falls within the Public Authorities Protection Act, 1893.

(*e*) *That the defendant is invested with some personal immunity which protects him from an action of tort*, e.g. State or diplomatic immunity or the protection arising from section 4 of the Trades Disputes Act, 1906.

(*f*) *Damage done in foreign country.*—In the case of an action in an English court to recover damage or loss caused by an aircraft outside England, it would be necessary for the plaintiff to prove that the act or omission causing the damage or loss was at the time of its occurrence, and at the time of action brought, actionable or at any rate not justifiable by the law of the place where it occurred, and also actionable in England.[2]

(*g*) *Felony.*—If the act or omission causing the loss or damage was felonious, no action would lie at the suit of the actual sufferer by the felony against the actual perpetrator of the felony until he had been prosecuted for the felony.[3]

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[1] *Thomson* v. *Lord Clanmorris* [1900] 1 Ch. 718.

[2] As to torts committed on the high seas, see later, Chapter 5.

[3] *Osborn* v. *Gillett* (1873) L. R. 8 Ex. 88 ; *Ex parte Ball* (1879) 10 Ch. D. 667. For details, see Salmond, pp. 206, 207.

## § 36. CIVIL LIABILITY FOR BREACH OF THE STATUTORY OBLIGATION

" The breach of a duty created by statute, if it results in damage to an individual, is *prima facie* a tort, for which an action for damages will lie at his suit." [1] The Air Navigation Act, 1920, and the Orders in Council made thereunder impose many duties in respect of the navigation of aircraft both as to compliance with general safety regulations and for other purposes. Does a breach of any of these duties, and, if so, of which of them, give rise to an action of damages at the suit of a person injured thereby? The Act itself is in this respect a skeleton. Section 3 provides the necessary authority for the making of Orders in Council, including therein the imposition of penalties for non-compliance (not exceeding imprisonment for a term of six months and a fine of two hundred pounds). (Section 12 (Power to provide for investigation of accidents) is self-contained and enacts penalties for its breach; it need not be considered until later.) The Consolidated Order, consisting at present of 36 articles and a number of Schedules, enacts a large number of regulations dealing with safety (in particular article 9) and other matters, and article 27 provides that when a breach of the Order is committed by an aircraft or in respect of an aircraft, " the owner or hirer of the aircraft (if other than the Crown) and the pilot or commander thereof shall be deemed to have contravened or, as the case may be, failed to comply with this Order "; subsection 3 of the same article imposes upon " any person who contravenes or fails to comply with this Order or any provision thereof " liability to imprisonment for a term not exceeding six months or to a fine not exceeding two hundred pounds, or to both.

Does a contravention or failure to comply also expose the offender to liability to an action for damages at the suit of a person injured thereby?

The principles governing this kind of question have recently been explored in the case of *Phillips* v. *Britannia Hygienic Laundry Co.*,[2] in which the judgment of a

[1] Salmond, p. 635.

[2] [1923] 1 K. B. 539; 2 K. B. 832.

Divisional Court of the King's Bench Division (McCardie and Bailhache, JJ.), on appeal from the county court, was upheld in the Court of Appeal (Bankes, Atkin and Younger, L.JJ.). The plaintiff's van had been injured while on the public highway by the fact of a wheel coming off the defendants' lorry owing to a defect in an axle, the lorry having been received back only two days before the accident from a reputable firm of repairers. Negligence on the part of the defendants themselves was negatived by the judge of first instance. The particular ground of the plaintiff's claim which interests us is that the defendants had contravened a certain regulation of the Motor Car (Use and Construction) Order, 1904, made under the Locomotives on Highways Act, 1896, and that damage had resulted to the plaintiff from this breach. This regulation provided that:

> " The motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway."

Breach of this regulation was punishable by a fine not exceeding £10. McCardie, J., took the view that a breach of this regulation afforded to the plaintiff no action for damages because it was not enacted for the benefit of any particular class of persons of which the plaintiff was a member,[1] but was made for the benefit of the whole public " whether pedestrians or vehicle users, whether aliens or British citizens," so that the plaintiff was unable to recover. The Court of Appeal considered that McCardie, J., had applied too strict a test and upheld his judgment on the wider ground that " the duty . . . was not a duty enforced by individuals injured, but a public duty only, the sole remedy for which is the remedy provided by way of a fine." [2] The passage quoted with approval by McCardie, J., from Beven on *Negligence*,[3] with reference to these regulations is very much in point: " These alterations in the law, while they permit the use of motor-cars and regulate their user,

[1] Like the workman injured by the breach of duty upon a manufacturer to fence dangerous machinery in *Groves* v. *Lord Wimborne* [1898] 2 Q. B. 402.
[2] *Per* Atkin, L.J., [1923] 2 K. B. at p. 842.
[3] 3rd ed., vol. i., p. 440.

are directed to the public and police aspects of the case, and do not affect individual rights or remedies." And Bankes, L.J., in the Court of Appeal,[1] referred to a statement by Lord Tenterden in *Doe* v. *Bridges*:[2] " Where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that performance cannot be enforced in any other manner."

In a matter of construction such as this is, it is dangerous to argue from one statute to another. But I think the decision mentioned above is nevertheless instructive. The Motor Car regulations under discussion and the regulations of the Consolidated Order have this feature in common that they both contain a multifarious body of regulations of varying degrees of importance, and many of them have nothing to do with the safety of individuals. For instance, it is difficult to see what a regulation as to the width of the wheels of a motor car or as to the necessity of keeping the certificate of airworthiness of an aircraft " in the pocket of the journey log-book " has to do with the safety of individuals. Both sets of regulations are designed to protect the public generally and seem to create public duties rather than duties enforceable by particular persons.

I submit, therefore, the view that the Act of 1920 and the Orders in Council thereunder do not create new rights of action for damages in persons who may happen to be injured by contraventions of or failure to comply with the provisions of these enactments.[3]

§ 37. *Limits upon the Scope of Section* 9.—It is now desirable to restate the cases in which section 9 of the Act of 1920 does not apply, either wholly or in part, with the result that we are thrown back upon the principles of the common law.

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[1] [1923] 2 K. B. at p. 838.

[2] (1831) 1 B. and Ad. at p. 859; cited by Lord Halsbury in *Pasmore* v. *Oswaldtwistle Urban Council* [1898] A. C. at p. 394. And see Craies on *Statute Law*, 3rd ed., 1923, pp. 213–216.

[3] The contrary view was taken by Reed, J., in *Strand* v. *Dominion Airlines, Limited*, decided in the Supreme Court of New Zealand on December 19, 1931; see note on p. 143 below.

These cases are as follows :

(1) The Act of 1920 does not apply to aircraft belonging to or exclusively employed in the service of His Majesty (section 18). Power exists to apply any of the provisions of the Act by Order in Council to such aircraft, but so far that power has not been exercised.

(2) The immunity from actions for trespass and nuisance conferred by section 9 (but not the liability for material damage or loss imposed by it) is dependent upon the condition that the provisions of (*a*) the Act, (*b*) any Order in Council made thereunder, and (*c*) the Convention of 1919, have been complied with.

(3) This immunity does not apply to aircraft which do not possess the nationality of a State party to the Convention of 1919 or to a special Convention of the kind referred to in article 5 of the Convention of 1919 and which do not hold a special and temporary authorization under that article ; but there is no reason why the liability for material damage imposed by section 9 should not apply to such aircraft.

(4) This immunity only applies when the flight takes place " at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case, is reasonable."

# CHAPTER 5

## JURISDICTION IN RESPECT OF AIRCRAFT

§ 38. In this chapter I propose to address myself to two questions: (i) how will the rules of English law determine the country [1] or countries whose national law and jurisdiction govern persons in, and events happening in, an aircraft at any point of time; and (ii) in the case of England,[2] which of two systems of law applicable to persons and events within its jurisdiction, namely, the common law or the law maritime, is applicable to the facts under consideration.

In the complete absence of judicial precedents the contents of this chapter must of necessity be highly speculative. At the same time I must avoid being drawn into a discussion of the whole question of "choice of law."

The Convention of 1919 gives no direct answer to these questions.[3] But there are two provisions which shed an indirect light upon them:

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[1] In the sense used by Dicey, p. 57: "'Country' means the whole of a territory subject under one sovereign to one system of law."

[2] The maritime law of Scotland is the same as that of England: *Currie* v. *McKnight* [1897] A. C. 97; Dicey, p. 730, note (*k*).

[3] When the draft Convention of 1919 left the hands of the *Sous-Commission juridique de la Commission de l'aéronautique de la Conference de la Paix* it contained the following article (numbered at one time 22, and later 23):

"All persons on board an aircraft shall conform to the laws and regulations of the State visited.

"In case of flight made without landing from frontier to frontier, all persons on board shall conform to the laws and regulations of the country flown over, the purpose of which is to ensure that the passage is innocent.

"Legal relations between persons on board an aircraft in flight are governed by the law of the nationality of the aircraft.

"In case of crime or misdemeanour committed by one person against another on board an aircraft in flight the jurisdiction of the State flown over applies only in case the crime or misdemeanour is committed against a national of such State, and is followed by a landing during the same journey upon its territory.

"The State flown over has jurisdiction:—

(1) With regard to every breach of its laws for the public safety and its military and fiscal laws;

(2) In case of a breach of its regulations concerning air navigation."

Eventually, however, the *Comité des juristes de la Conférence de la Paix*

By article 1 :

" The high contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory."

By article 6 :

" Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section 1 (*c*) of Annex A."

The Act of 1920 comes closer to our problems. Its preamble recites that

" the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto,"

and article 1 of the Consolidated Order made under the Act enacts the provisions of the Convention as to nationality.

Section 14 of the Act provides that

" (1) Any offence under this Act or under an Order in Council or regulations made thereunder, *and any offence whatever committed on a British aircraft*, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be " (italics ours).

" (2) His Majesty may, by Order in Council, make provision as to the courts in which proceedings may be taken for enforcing any claim under this Act, *or any other claim in respect of aircraft*, and in particular " [may confer jurisdiction upon any court exercising Admiralty jurisdiction] (italics ours).

(Subsection 3 applies section 692 of the Merchant Shipping Act, 1894, with the necessary modifications, to

expressed the opinion that paragraphs 1, 2, and 5 were the natural consequence of article 1 of the Convention (sovereignty in the air space), and that paragraphs 3 and 4 dealt with questions of conflict of laws and international criminal law which equally arose in the case of transit by sea and by rail and could therefore be left to the operation of the general principles of law. Accordingly the draft article was deleted (see Roper, pp. 155–157). The comment made by the British Air Ministry in publishing the text of the Convention (Cmd. 670 of 1920) is as follows : " . . . Objections were made to this Article [23] by other Powers on the ground that the doctrine of territorial sovereignty asserted in Article 1 of the Convention was sufficiently broad to cover all the questions dealt with in Article 23, and therefore that Article 23 was unnecessary. The Article was consequently removed from the Convention altogether."

the detention of any aircraft in any circumstances in which a ship may be detained by official action under that section.)

So far the only exercise by the Crown of the power conferred by subsection 2 above quoted, consists of the Order in Council as to Wreck and Salvage which is discussed later.[1]

The Consolidated Order made under the Act enacts (article 2) that the provisions of the Order apply (unless the contrary intention appears) :

> " (*a*) to all British aircraft registered in Great Britain and Northern Ireland wherever such aircraft may be ;
>
> " (*b*) to other British aircraft and foreign aircraft when such aircraft are in or over Great Britain and Northern Ireland ;
>
> and for the purposes of liability under this Order, other than liability for want of registration, where an aircraft is not registered, and by reason thereof has no nationality for the purposes of this Order, this Order shall apply to such aircraft when flying within Great Britain and Northern Ireland in like manner as it applies to aircraft registered in Great Britain and Northern Ireland."

If we are to refrain from loading ourselves with unnecessary details, the foregoing appear to be the main statements of principle afforded by the *lex scripta* for our guidance. We must now indulge in a short spell of theory.

The places in which the aircraft may be and which therefore require consideration appear to be the following :

(1) on British land, *e.g.* the Croydon aerodrome,
(2) above it,
(3) on non-tidal British inland [2] waters, *e.g.* the Thames at Henley,
(4) above them,
(5) on tidal British inland [2] waters, *e.g.* the Thames at Gravesend,
(6) above them,

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[1] S. R. & O. 1921, No. 1286 ; see later, p. 137.

[2] For the distinction between inland and territorial waters, see Oppenheim, vol. i., § 172, and note (2).

(7) on British territorial waters, *e.g.* within three miles of low-water mark at Dover,
(8) above them,
(9) on the high seas,
(10) above them,
(11) to (18): the same as (1) to (8) in the case of a foreign country.[1]

The aircraft in question may be :

(1) British or
(2) foreign, or
(3) stateless.

For the purposes of the Consolidated Order, as we have seen above (article 1) the classification is as follows :

(*a*) registered in Great Britain or Northern Ireland ;
(*b*) other British aircraft ;
(*c*) foreign aircraft ;
(*d*) stateless aircraft, which are assimilated to (*a*) above.

Our inquiry is wider than the contents of the Consolidated Order, so that both classifications must be kept in mind. We may leave on one side the separate registration systems and jurisdictions of such of the Self-Governing Dominions, India, Crown Colonies, Protectorates, and Mandated Territories as have them, and use the term " British " as applying to aircraft pertaining to Great Britain and Northern Ireland.

§ 39. Before going further we may pause to inquire what manner of thing in the eye of the law an aircraft is. It clearly belongs to the category of movable property. Ships are movable property, but, from the point of view of jurisdiction and other matters, they are property of a peculiar kind ; they have a nationality, unlike a caravan or a motor-car, the nationality of the country in which they are registered, and almost a personality in that actions can be brought against them, that is, *in rem*, in a court having Admiralty jurisdiction ; persons who are, and events which happen, on board a ship are to a large

[1] As to the legal position of the seadrome, see Fixel in *Journal of Air Law*, II (1931), pp. 24–28.

extent governed by the " law of the flag " of that ship, that is, the law of the country [1] whose flag the ship carries, sometimes exclusively as in the case of State ships, sometimes concurrently with another legal system. On the other hand, caravans and motor-cars do not possess these characteristics. An assault in an English car by one passenger touring in France upon another is just as much subject to French law as if the car stopped and let them fight it out in an *estaminet*. An English motor ambulance is sent to Marseilles to meet a lady who is hurrying home from India in order to have her confinement in London. The baby is born *en route* in France. It is just as much, or just as little, French as if it were born in a French ambulance or a French hospital. If it has been born on a P. and O. liner before reaching Marseilles the " law of the flag " would have been a relevant factor, but a motor ambulance has no law of the flag.[2]

Must an aircraft be assimilated to a ship or to a motor-car ? The use of such nautical terms as " airship, aircraft, navigation, etc.," have led us into habits of thought which we might have escaped if we had been able to confine ourselves to terms like " balloons," " flying machines," " aeroplanes." I have no hestitation in submitting the opinion that from a juristic point of view the analogy between a ship and an aircraft is fundamentally wrong and misleading, and the sooner we eradicate it from our minds the better. That need not prevent us from borrowing from the law relating to ships certain useful provisions and applying them to aircraft by the deliberate process of legislation, but any general attempt to invest the aircraft, as such and wherever it may be, with the characteristic legal panoply which belongs to a ship will be disastrous.

I am fortified in this opinion by the views of one of our leading British experts on Air Law, Dr. J. M. Spaight, whose book entitled *Aircraft in Peace and the Law*, published in 1919, before the signing of the

[1] For the meaning of " country," see above, p. 87.

[2] A baby has been born in a balloon : see Bonnefoy, *Le code de l'air*, p. 216, cited Spaight, p. 114, note 17. Another was born in an aircraft in 1931.

Convention of that year, I find most stimulating and suggestive.

He wrote : [1]

" It is absurd to say, as M. Pittard [2] does, that an aeroplane is a ' movable object pure and simple,' and strictly analogous to a piano ! An aircraft is *sui generis* and something midway between an automobile and a ship ; to assimilate it entirely to the latter, and to assign it that full nationality which historical reasons have attributed to vessels, so that, in French law and to some extent in British, a ship is a floating part of the national territory,[3] would seem to the writer to be going too far."

Again, in a paragraph headed " The Essential Difference between Air and Sea Travel," [4] he wrote :

" For the present, at any rate, the usual view held is that aircraft should be assimilated to seacraft, and that the law of the flag should govern acts done on board. Simple and logical at first sight, this assimilation will be found on closer examination, the writer suggests, to be neither the one nor the other. The conditions of sea travel and air travel, similar in some respects, are entirely dissimilar in those which are of importance here. A ship is a floating home ; an aircraft is essentially a locomotive vehicle, a mechanical magic carpet in which one never settles down, and in which it is impossible to forget that the journey is a brief, passing interlude between ordinary life and business at one place and ordinary life and business at another. The passenger's connection with the flying machine is more casual and transitory than with a ship ; in an overland journey, at any rate, he is, to the aircraft, very much in the same relation as the pedestrian is to the motor-car which gives him a lift. In a sea voyage there is at least the break and interruption, even though temporary, of residence and even allegiance which departure from the territory involves. The aircraft, on the other hand, seems hardly to lose touch with the land (except, of course, in sea journeys, which are always likely to be fewer and less normal than cross-country journeys). There is, in fact, more similarity between a flying machine and an automobile than between it and a ship ; the analogy is obviously far from perfect, but for the writer's immediate purpose it is a more helpful comparison than the other."

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[1] At p. 17.
[2] *Revue juridique internationale de la locomotion aérienne*, 1912, p. 118.
[3] Like the island in *Gulliver's Travels*, which floated in the air.
[4] At pp. 115, 116.

These observations, in spite of the great development of aviation and of recent air endurance tests, remain true. The aircraft is not, as a matter of English Common Law, a new kind of ship, but is a piece of movable property to which certain specific marine characteristics have been and will be attached by legislation, and which is thereby gradually developing a legal quality *sui generis*.[1]

It would take us too long to speculate upon the several legal systems which ought to apply to the several categories of legal events, *e.g.* crimes, torts, contracts, quasi-contracts, salvage, births, deaths, marriages,[2] and making of wills and conveyances of property, etc., occurring upon each of the three kinds of aircraft above mentioned when in each of the eighteen *loci in quibus* above mentioned, and I must content myself with a few generalizations. May I remind my readers once more of the entire absence of direct judicial precedents, so that what I am indulging in is almost entire speculation ? [3]

§ 40. *Crimes*.[4]—(1) The effect [5] of section 14 of the Act of 1920 quoted above, is to render amenable to trial, wherever in Great Britain and Northern Ireland the offender may be, and under the law applicable to that part of Great Britain and Northern Ireland, any person, British or foreign or stateless, who commits

(*a*) " any offence whatever . . . on a British aircraft," [6] or

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[1] We shall return to the matter of the applicability of the analogy of a ship in Chapter 7.

[2] Spaight, p. 114, mentions a case of a "freak" wedding in the air over New York or its environs.

[3] I am obviously not now concerned with other factors determining which jurisdiction and legal system are relevant, such as nationality and domicile, but only with the factor of locality.

[4] See also Russell on *Crimes* (8th ed., 1923), vol. i., pp. 29–57 ; and Beckett, *Criminal Jurisdiction over Foreigners* in *British Year Book of International Law*, 1925, pp. 44–60, and *ibid.*, 1927, pp. 108–128. It is necessary also to bear in mind that in fixing the locality of a criminal act regard is had both by English law and by international law, both to the place where it is committed and to the place where it took effect : see *The Lotus*, Publications of the Permanent Court of International Justice, Series A, No. 10, and Russell, *op. cit.*, vol. i., pp. 53–57.

[5] It is, however, arguable that this subsection relates only to *venue*, and fixes the appropriate court in cases in which upon other grounds jurisdiction is exercisable by Great Britain. But I prefer the view expressed in the text.

[6] Does this mean only when the aircraft is in flight or both then and also when it is stationary ? I incline to the latter view.

(*b*) " any offence under this Act or under an Order in Council or regulations made thereunder."

For instance, a person, whether British or foreign or stateless, commits the crime of manslaughter while on board a British aircraft flying in France or in mid-Atlantic, and is subsequently found in England; he may be punished under English law.[1] A person, whether British or foreign or stateless, while on board a French aircraft flying in England smokes a cigarette contrary to article 9 (3) of the Consolidated Order, and is subsequently found in England; he may be punished under the Consolidated Order.

(2) Further, I submit that by the common law and the Territorial Waters Jurisdiction Act, 1878, the perpetrator of any act (including an omission) in any aircraft when in or over Great Britain or Northern Ireland, which would be a crime if committed on the subjacent land or water may be tried, if and when he can be arrested within the jurisdiction, under the law applicable to that part of Great Britain or Northern Ireland or pertinent inland or territorial waters.[2] This is a bare assertion, but is, I think, self-evident, particularly in view of the first paragraph of the preamble of the Act of 1920.

(3) In so far as present or future extradition treaties may provide, persons accused of crimes under (1) and (2) above may be brought within the jurisdiction and tried.

§ 41. *Torts.*—(1) *Torts over Great Britain or Northern Ireland.*—A tort committed by a person in *any* aircraft when in the air over Great Britain or Northern Ireland or the pertinent inland or territorial[3] waters is cognizable

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[1] This is a legislative assimilation of British aircraft to British ships for the purpose of criminal jurisdiction: see Russell, *op. cit.*, vol. i., pp. 32 *et seq.*

[2] See also Criminal Law Act, 1826, s. 13, as to offences committed on a journey or voyage, which I think applies to aircraft; but it relates to *venue* rather than to jurisdiction; Russell, *op. cit.*, vol. i., pp. 21 *et seq.*

The American Uniform State Law for Aeronautics (as to its scope, see above, p. 67) provides (section 7) that: " All crimes, torts and other wrongs committed by or against an aeronaut or passenger while in flight over this State shall be governed by the laws of this State. . . ."

[3] The Territorial Waters Jurisdiction Act, 1878, only refers to " offences " as therein defined. It has not yet been decided whether it confers on British courts jurisdiction as to torts committed in those waters which are also

as a tort committed on the subjacent land or water.[1] This, again, is a bare assertion, but I do not think it will be denied. (There is, however, one tort, namely, infringement of patents, which is specially provided for by article 18 of the Convention of 1919 and section 13 of the Act of 1920; these provisions protect a foreign infringing aircraft from detention on the ground of infringement provided that the owner deposits certain security.)

(2) *Torts on or over the high seas.*—The rule as to torts committed on the high seas is stated by Dicey [2] as follows:

> "An act done on board a ship on the high seas is governed by the law of the country to which the ship belongs, *e.g.* England, France or Italy. This is obviously the only law applicable where the act in question is done by one person on board the vessel to the detriment of another person also on board the vessel . . ."

That does not help us a great deal, because it confronts us with the simple question whether we are prepared to apply the analogy of a ship to an aircraft and answer that the law of the country whose nationality the aircraft bears must apply. The law abhors a vacuum and *boni judicis est ampliare jurisdictionem.*[3] Many lawyers would be prepared to argue that the law of the country of registration will apply, and that, if British, it is a tort committed in Great Britain, if foreign, it is a tort committed in a foreign country. There is, however, a sounder ground upon which to base ourselves, and we need not resort to this analogy.

It is a mistake to think that the high seas are a sort of no man's land governed by no law. In the case of *Submarine Telegraph Co.* v. *Dickson* [4] in 1866, the Court of Common Pleas held that it had jurisdiction to award

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"offences" as therein defined, and as to torts which have no criminal aspect at all. A tort consisting of a collision between two ships is cognizable in an English court even when it occurs on the high seas.

[1] See note (2) on p. 94 as to the American Uniform State Law for Aeronautics.

[2] *Op. cit.*, p. 728.

[3] Broom, *op. cit.*, p. 57.

[4] 33 L. J. C. P. 139.

the plaintiffs damages for injury done to their submarine cable on the high seas by the defendants, Swedish ship-owners, owing to its being fouled and dragged by an anchor belonging to one of their ships. (The action was *in personam*, and how the defendants, who were domiciled in Sweden, were effectively served with the writ of summons does not appear.) Erle, C.J., said: "It is quite clear that our Courts have jurisdiction over causes of action arising on the high seas, and, had the cable been wilfully broken, no one would have disputed their power to try the offence." Willes, J., made an interesting remark: "I attach no weight to the mere novelty of this case—a novelty of circumstances, not in principle." Notice that this was an action of tort—an action on the "case" founded on negligence—and was decided under the common law; the maritime law was not invoked. Again, in *Chartered Mercantile Bank of India* v. *Netherlands India Steam Navigation Company*,[1] an action in tort—on the "case" founded on negligence—was brought by cargo-owners against an English company, the owners of two ships which came into collision on the high seas, to recover for the loss of cargo being carried by one of them. The court found negligence in the navigation of the other ship. The Court of Appeal awarded damages to the plaintiffs, holding that it had jurisdiction in respect of a tort committed on the high seas. Brett, L.J., said[2]: "the negligence complained of in this action took place upon the high seas, which is the common ground of all countries." The nationality of the two ships was claimed to be Dutch, but the court held them to be British though carrying the Dutch flag and registered in Holland. Nevertheless, Brett, L.J., was prepared to assume that they were Dutch, and said that on that assumption

> "inasmuch as the injury to the plaintiffs was committed by the servants of the defendants, not in any foreign country, but on the high seas, which are subject to the jurisdiction of all countries, the question of negligence in a collision raised in a suit in this country is to be tried, not indeed by the common

[1] (1882) 9 Q. B. D. 118; (1883) 10 Q. B. D. 521.
[2] At p. 537.

law of England, but by the maritime law, which is part of the common law of England as administered in this country; and by the maritime law of England . . . a shipowner is liable for the negligence of the master and crew of his ship."

This action was in the King's Bench Division, but by the Supreme Court of Judicature Act, 1873, s. 25, sub-s. 29, the rule of the Admiralty prevailed, and, both vessels having been found to blame, the plaintiffs only recovered one-half of their damage, being protected against the consequences of the fault of the carrying ship by the bill of lading. The reason for the application of the maritime law was, it is submitted, not that the cause of action arose on the high seas, but that it arose out of a collision.

In *The Tubantia*,[1] where an action was brought by salvors for trespass and/or for wrongful interference with the salvage services being rendered by the plaintiffs to a wrecked ship which they had located lying in nineteen or twenty fathoms of water, the acts complained of were fouling the plaintiffs' moorings (by which I understand the ropes wherewith they had buoyed the wreck after locating it), taking a mooring from the wreck, and sending down a diver who entered the wreck. The President of the Admiralty Court (Sir Henry Duke, as he then was) had no difficulty in holding that he had jurisdiction over the torts in question: "A suit in respect of injurious acts done upon the high seas was within the undisputed jurisdiction of the Court of Admiralty, as appears from Comyn's *Digest*, tit. 'Admiralty' (E. 7), and Blackstone's *Commentaries*, iii., 106,"[2] and accordingly he granted an injunction to restrain the defendants and referred the damages for assessment according to the usual procedure. Three points should be noted: (i) that this was a case of a pure common law tort, namely, trespass; (ii) that there is no suggestion that Admiralty jurisdiction is confined to events happening on the surface of the water; and (iii) that the jurisdiction arises from the locality of the injury and not from any maritime characteristic which it may

[1] [1924] P. 78.

[2] See also *The Ruckers* (1801) 4 C. Rob. 73; *The Hercules* (1819) 2 Dods. 353, at p. 371; *The Zeta* [1893] A. C. 468.

possess. As Sir William Scott (who became Lord Stowell) said in *The Ruckers*,[1] a case of personal assault by the master on a passenger on the high seas : " Looking to the locality of the injury, that it was done on the high seas, it seems to be fit matter for redress in this court." In that case the registrar had searched the records of the court as far back as 1730, and reported many " proceedings of damage," by which he meant assaults, between persons on the same ship and on different ships.

Formerly, it seems, this jurisdiction in the matter of torts was confined to those occurring on the high seas, but, at any rate, as regards damage done or sustained by ships, this is no longer true.[2]

The conclusions which we are entitled to draw from the cases discussed above are, it is submitted, as follows :

(i) A tort committed on or over the high seas is not outside the jurisdiction of all countries, but is cognizable by the jurisdiction of any country which can render the tortfeasor amenable to its jurisdiction by the service of a writ or notice of a writ ;

(ii) The law governing such a tort is, in the case of the United Kingdom, either the common law of the part of the United Kingdom in which the action is properly brought, or, in the case of a tort falling within the scope of the maritime law, such as collision between ships or between a ship and another object,[3] then the maritime law.

(3) *Torts in or over Foreign Land or Waters.*—A tort committed in any aircraft, British or not, on or over foreign land or inland or territorial waters is subject to the general rule governing foreign torts which is stated by Dicey [4] as follows :

> " An act done in a foreign country is a tort, and actionable as such in England, if it is *both*
>
> (1) wrongful, *i.e.* not justifiable, according to the law of the foreign country where it was done ; *and*

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[1] *Supra*, at p. 76. See Williams and Bruce, *Admiralty Practice* (3rd ed., 1902), p. 73, note (*a*).

[2] See Williams and Bruce, *op. cit.*, p. 73, and *The Zeta* [1893] A. C. 468.

[3] *The Zeta, supra.*

[4] *Op. cit.*, Rule 188.

(2) wrongful, *i.e.* actionable as a tort, according to English law, or, in other words, is an act which, if done in England, would be a tort."

It is, however, now certain, in spite of earlier decisions to the contrary, that no action lies in an English court for trespass to foreign land, even when no question of title arises.[1]

§ 42. (4) *Collisions between Aircraft in the Air.*—This particular kind of tort deserves specific mention. Fundamentally, liability for a collision between two aircraft or between an aircraft and a fixed structure or a ship depends upon negligence. When, however, two colliding aircraft bear the nationality of one or more parties to the Convention of 1919, or when the collision occurs over any part of Great Britain or Northern Ireland, the question of the observance or non-observance of the Rules contained in Annex D of that Convention as to Lights, Signals and Air Traffic (enacted in Schedule IV. of the Consolidated Order) becomes a vital factor in determining the question of negligence. Apart from that, it seems that actions to recover damages resulting from a collision are governed by the principles stated above with regard to torts generally.[2]

When the collision occurs above land, including inland waters, the common law court exercising jurisdiction over the subjacent land or water will have jurisdiction as it has in the case of a collision between two vehicles on the road.

When, however, it occurs over water upon which a common law court does not normally have jurisdiction, it seems to me that we must look to another court for jurisdiction. We have already seen that English admiralty courts have a jurisdiction in tort of a more extensive kind than is, I think, generally realized. Where a collision between two aircraft in the air takes place

[1] *British South Africa Co.* v. *Companhia de Moçambique* [1893] A. C. 602.

[2] The American Uniform State Law of Aeronautics, which has been adopted with or without modifications by more than twenty States, negatives the applicability of admiralty law and procedure by providing that liability for collisions of aircraft in the air or on the land " shall be determined by the rules of law applicable to torts on land " : Zollmann, *Cases*, p. 487.

over water upon which, or in which, an admiralty court would have jurisdiction in the case of torts committed upon it or in it, I submit that jurisdiction in respect of the collision will lie in that court. Further, I submit that there is nothing in such a collision to attract the law maritime any more than the torts of assault in *The Ruckers*,[1] and of trespass and conversion in *The Tubantia* [2] attracted the law maritime ; that the court would apply the common law relevant to an action based on negligence ; and that the action is *in personam* and not *in rem*. Moreover, if fault is found in both parties, the court will follow the principles of the common law as to the meaning and effect of contributory negligence and not the old *judicium rusticum* of the court of admiralty, which in the case of " both to blame " awarded to each one-half of its damages against the other, nor the more scientifically calculated damages " in proportion to the degree in which each vessel was in fault," for which the Maritime Conventions Act, 1911, section 1 (1), makes provision.

(5) *Collisions between Two Objects, of which at least One is on the Water*, also require special mention.

(i) When an aircraft is " manœuvring under its own power on the water," [3] it is required by section 49 of Schedule IV of the Consolidated Order to " conform to the Regulations for Preventing Collisions at Sea and *for the purposes of these Regulations* [it] shall be deemed to be a steam-vessel," except as to lights and sound signals (italics ours). The expression " for the purposes of these Regulations " means, of course, that (except as to lights carried and sound signals) she must act as a steam-vessel is required by those Regulations to act. I do not think that it means that the aircraft becomes a steam-vessel for any other purposes, such as that of attracting the admiralty procedure *in rem* in claims brought against its owners or the special rules administered by admiralty courts in dealing with collisions between ships.

[1] *Supra*, p. 98.
[2] *Supra*, p. 97.
[3] " Water " does not appear to denote merely sea water, and probably has by implication the same scope as water to which the " Regulations for Preventing Collisions at Sea " apply, that is to say, the high seas and " all waters connected therewith navigable by sea-going vessels " (Marsden, p. 296).

It is true that under section 14 (2) of the Act of 1920 power exists to make provision by Order in Council for conferring jurisdiction in such matters upon any court exercising admiralty jurisdiction and for applying admiralty procedure, but this power has not been exercised.

(ii) Quite apart from section 49 of Schedule IV of the Consolidated Order quoted above, are there no circumstances in which an admiralty court would, either by statute or as the inheritor of the ancient jurisdiction of the High Court of Admiralty, have jurisdiction ? I suggest that there are.

(*a*) *Ship Damaging Aircraft.*—In the case of collision damage done *to* an aircraft *by* a ship upon water over which an admiralty court would have jurisdiction in the case of damage done by one ship to another ship, I submit

(1) that an admiralty court would have jurisdiction ;
(2) that the law maritime applies ;
(3) that a maritime lien can attach to the ship for the damage done to the aircraft ; and
(4) that an action brought on behalf of the aircraft against the ship could lie *in rem*.

Marsden [1] cites a number of cases in which actions *in rem* have been brought against ships for damage done to objects other than ships, for instance, an oyster-bed,[2] a landing-stage,[3] a telegraph cable,[4] a breakwater, a wharf, a bridge, a house, etc. In such cases he suggests that a maritime lien attaches to the ship.[5]

(*b*) *Aircraft Damaging Ship.*—In the case of collision damage done *by* an aircraft *to* a ship which is upon water over which an admiralty court would have jurisdiction in the case of damage done by one ship to another, I submit

(1) that an admiralty court would have jurisdiction ;
(2) that the law maritime applies ;

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[1] At p. 89.
[2] *The Swift* [1901] P. 168.
[3] *The Veritas* [1901] P. 304.
[4] The *Clara Killam* (1870) L. R. 3 A. & E. 161.
[5] See Gorell Barnes, J., in *The Veritas*, *supra*, at pp. 309–311.

(3) that no maritime lien could attach to the aircraft, for it is only to a ship and her "tackle apparel and furniture" that a maritime lien could attach;

(4) that the action on behalf of the ship against the person responsible for the aircraft would be *in personam* and could not lie *in rem*.

In *The Zeta* [1] (a case of damage to a ship by collision with a pier), Lord Herschell, L.C., said: [2] "I cannot regard it as established that in the year 1840 its jurisdiction [*i.e.* that of the High Court of Admiralty] in the case of damage received by a ship was limited to damage received by collision with another vessel." [3]

In *The Sarah* [4] (a case of damage to a ship by a keel, in which the owner of the keel protested against the jurisdiction on the ground that a keel was not a ship or boat), Dr. Lushington said: "The Court has original jurisdiction because the matter complained of is a tort committed upon the high seas. It is not necessary to refer to any statute, and it is immaterial whether the vessel doing the damage was a sea-going vessel; immaterial also by what means it was navigated." [5] In this passage the emphasis is not upon the high seas.[6]

(*c*) *Aircraft Damaging Something not a Ship.*—In the case of collision damage done *by* an aircraft *to* an object not a ship, *e.g.* a pier, a lighthouse, a bridge, a floating derrick, a fort, which is upon or adjoins water over which an admiralty court would have jurisdiction in the case of damage done to that object by a ship, I incline to think

(1) that an admiralty court has no jurisdiction; [7]

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[1] *Supra*, p. 98, with an interesting commentary upon the Admiral's jurisdiction by Marsden in *L. Q. R.*, x. (1894), pp. 113–116.

[2] At p. 485.

[3] See also Lord Herschell, at p. 484, after referring to a series of decisions: "These cases appear to me to indicate the exercise by the Court of Admiralty of jurisdiction in cases of damage received by ships from their collision with foreign objects, owing to the wrongful acts of the owners of those objects."

[4] (1862) Lush. 549, approved in *The Zeta*, *supra*, at p. 481.

[5] See also *The Tubantia*, *supra*, p. 97.

[6] See cases cited by Marsden, p. 89, note (*u*).

[7] Except where the collision damage occurred on the high seas, for instance, to a lightship. In such a case I think that a court of admiralty would have jurisdiction (*The Tubantia*, *supra*), but perhaps not exclusive jurisdiction. At any rate, the common law would apply.

(2) that jurisdiction lies with a common law court and that the common law applies ; and
(3) that the action is *in personam*.[1]

§ 43. *Contracts*.—The locality of the making of a contract or of its intended performance or of its actual breach may become relevant in a number of different ways. (*a*) As regards contractual capacity, it is probable that in the case of mercantile contracts, and those only, the capacity of a contracting party depends upon the *lex loci contractus*.[2] (*b*) As regards form, the formal validity contract is governed by the *lex loci contractus* [2] (*locus regit actum*), with some important exceptions of which contracts operating as conveyances of immovable property are the most important. (*c*) As regards essential validity, a contract is unlawful (whether lawful by its proper law or not) if its making is unlawful in the country where it is made (*lex loci contractus*) [2] or its performance is unlawful in the country where it is to be performed (*lex loci solutionis*). (*d*) As regards a breach of contract, it may become necessary to decide the question within what national jurisdiction the breach has occurred.

How are we to give effect to this factor of locality in the case of contracts made, or to be performed, or actually broken, in the air ? (It must be noticed that locality as regards contracts sometimes presents a somewhat different problem to locality as regards crimes and torts. In those cases the question is, Within what jurisdiction was the criminal or tortious act done, and what law determines the ensuing liability ? In the case of contracts the corresponding act giving rise to the question of liability is a breach of the contract. But quite apart from breaches it frequently becomes necessary to decide what is the system of law prevailing in the *locus contractus* or the *locus solutionis* irrespective of any question of jurisdiction to enforce the contract.)

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[1] I do not propose to investigate the question whether what has been said in this section about an admiralty court applies to the county courts exercising admiralty jurisdiction as well as to the Probate Divorce and Admiralty Division.

[2] As used by Dicey, p. 67. " The law of the country or place where the contract is made or entered into."

1. *Contracts Made or to be Performed and Contracts Broken over Land or Territorial or Inland Waters.*—I think we can dismiss this class of case briefly by saying that they are in the same position as if the contract was made,[1] or was to be performed, or the breach took place, on the subjacent land or waters, and that the contract is deemed to have been made or to be intended to be performed, and the breach is deemed to have occurred, within the local State. The authority for this statement as regards territorial waters is somewhat indirect, but may, I think, be adequately deduced from the general jurisdiction exercisable over territory including territorial waters.[2]

2. *Contracts made or to be performed in aircraft over or on the high seas.*—As to these, we must first examine the jurisdiction of courts of admiralty as successors to that of the court of the extinct Lord High Admiral. By the statute 15 Rich. 2, c. 3, entitled, "In what places the admiral's jurisdiction doth lie," it is [3]

> "Declared, ordained, and established, that of all manner of contracts, pleas, and quarrels and of all other things done rising within the bodies of the counties, as well by land as by water, and also wreck of the sea, the Admiral's Court shall have no manner of cognizance, power, nor jurisdiction; but all such manner of contracts, pleas, and quarrels (querelæ) . . . shall be tried, determined, discussed and remedied by the laws of the land, and not before nor by the admiral . . ."

That is purely negative.

Then in the eighth year of James I upon a complaint being made to him by the Lord High Admiral against the encroachments of the common law judges upon his jurisdiction by means of prohibitions we find them answering as follows: [4]

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[1] The American Uniform State Law of Aeronautics (as to scope, see above, p. 67), provides that (section 8): "All contractual and other legal relations entered into by aëronauts or passengers while in flight over this State shall have the same effect as if entered into on the land or water beneath."

[2] *Reg.* v. *Keyn* (1876) 2 Ex. D. 63. It cannot too often be emphasized that this case turned upon a plea to the jurisdiction of the Central Criminal Court, and that the conviction was quashed because that court had never been invested with jurisdiction over crimes committed by foreigners in British territorial waters. As to the Territorial Waters Jurisdiction Act, 1878, see above, p. 94.

[3] Cited in *Reg.* v. *Keyn*, *supra*, at p. 67.

[4] Coke's *Institutes*, iv., p. 134; cited in *The Zeta*, *supra*, at p. 482.

" We acknowledge that of contracts pleas and querels made upon the sea, or any part thereof which is not within any country (from whence no triall can be had by twelve men [1]), the admirall hath and ought to have jurisdiction."

Then Blackstone tells us [2] that

" the courts maritime or admiralty courts " . . . " have jurisdiction and power to try and determine all maritime causes, or such injuries which though they are in their nature of common law cognizance,[3] yet, being committed upon the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own " . . . " As the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England; so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea was made at the royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster-hall."

To this Lord Chancellor Herschell, from whose speech in *The Zeta* [4] the two preceding quotations are taken, adds:

" There can be no doubt that after the fiction was introduced to which Blackstone refers, any jurisdiction which the Court may have previously exercised in relation to contracts made upon the high seas fell into disuse, and it would be outside the present purpose to inquire what jurisdiction the Court of Admiralty possesses in relation to contracts. Your lordships are at present concerned with its jurisdiction as regards torts [damage to a ship by collision with a pierhead]. The fiction to which reference has been made was made use of, not only in cases of contract, but also in those cases of tort which were in their nature transitory." [5]

We have already seen [6] that in the case of torts committed on the high seas the jurisdiction of the modern

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[1] This expression illustrates the difficulty of disentangling *venue* from jurisdiction.

[2] *Commentaries*, Book III., 106, 107.

[3] *E.g.*, I submit, contracts. For certain exceptions, see Blackstone, *loc. cit.*

[4] [1893] A. C. at p. 482.

[5] Upon the jurisdiction of the court of the Lord High Admiral, see Holdsworth, *op. cit.*, vol. i., pp. 544–560.

[6] Above, pp. 95–98.

courts of admiralty is active to-day, and I see no reason to doubt that it is equally active in regard to contracts *made* on the high seas as to those *broken* on the high seas,[1] though the extracts quoted do not indicate that this distinction was clearly grasped. Moreover, as in the case of torts other than collisions, the relevant branch of English law is the common law, or perhaps in the case of certain contracts pertaining to ships the maritime law. It must be admitted that this does not go so far as to prove beyond all shadow of a doubt that the system of law governing a contract made or intended to be performed on the high seas will be held by English courts to be the English common law. But I submit that an English court, in circumstances in which the principles of the Conflict of Laws as understood and applied in England exclude the applicability of the *lex domicilii* or the *lex fori* or the *lex situs rei sitae* and require a reference to the *lex loci contractus* or the *lex loci solutionis*, would, rather than admit a legal vacuum upon the high seas, hold that the English common law applies.[2]

Dr. Spaight [3] suggested in 1919 that, instead of attempting to find a *lex loci contractus* for a contract made in the air when the principles of the Conflict of Laws would hold that law to be relevant, we ought simply to substitute in these circumstances the *lex loci solutionis* and ignore the *locus contractus*. That would be an easier solution, but I venture to think that the English courts, at any rate, with their passionate devotion to precedents, will strive their hardest to extract an analogy from the high seas when there is no subjacent State whose law they can apply.

It is considered convenient to postpone discussion of the rules of Conflict of Laws applicable to Contracts of Carriage until we deal with those contracts in the next chapter.

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[1] In *Godfrey's Case* (1625) Latch, 11, 82 English Reports, 249, it is asserted by the Court of King's Bench that the admiralty court has jurisdiction over contracts made at sea.

[2] Can an aircraft in flight have a changing *situs* or must we assign it to its country of registration? As to the proposal of fixing its nationality by its *port d'attache*, see Spaight, pp. 16, 17, 20, 21, 117.

[3] Pp. 127, 129, 130. It should be noted that article 23 of the draft Convention of 1919, as printed on p. 87 above, was omitted before signature.

§ 44. *Births, Deaths, and Marriages.*—I have stated elsewhere in this book [1] my reasons for rejecting the attractive analogy between the ship and the aircraft, except where it has been specifically adopted by statute. In dealing with the topics mentioned above I shall therefore assume that an aircraft, even a seaplane, cannot be assimilated to a ship. One of the most important consequences of that assumption is to deny to events taking place on board an aircraft that peculiar association with the State of the flag carried by a ship which is sometimes loosely expressed in the misleading fiction that a ship is deemed to be a floating part of the territory whose flag she carries. It is true that aircraft, like ships, can have a nationality, but my submission is that their nationality does not, like the nationality of ships, possess the peculiar legal quality of attributing to events happening on board an aircraft the locality of the State in which it is registered.

(1) *Occurring in an Aircraft over Land on Inland or Territorial* [2] *Waters.*—I submit the view that in such cases an English court will apply the law of the subjacent State, regardless of the nationality of the aircraft, to determine the legal consequences of births, deaths, and marriages, and will treat them as if they had occurred on the subjacent land or water.

(2) *Occurring in an Aircraft over or on the High Seas.*—It will be convenient to discuss the events separately.

(*a*) *Birth.*—Persons "born within His Majesty's dominions and allegiance" are, by the British Nationality and Status of Aliens Acts, 1914 to 1922, natural-born British subjects. Among the extensions of this rule are "any persons born on board a British ship whether in foreign territorial waters or not," but for the reasons already given I am not prepared to assimilate an aircraft, even a seaplane, to a ship for this purpose. It is probable that the rule also includes persons born in foreign territory occupied by British troops among natural-born

[1] See above, pp. 90–93, and later, p. 132.

[2] It should be noted that by section 1 (2) of the British Nationality and Status of Aliens Act, 1914, "a person born on board a foreign ship shall not be deemed to be a British subject by reason only that the ship was in British territorial waters at the time of his birth."

British subjects.[1] So much for the *jus soli*. But by section 1 (1) (*b*) of the Act of 1914, as amended in 1918 and 1922, applying the *jus sanguinis*, natural-born British subjects also include "any person born out of His Majesty's dominions, whose father was, at the time of that person's birth, a British subject," and who fulfils certain other conditions of which one is the registration of his birth at a British Consulate within one year. It is difficult to see how a person born in an aircraft on or over the high seas can become a natural-born British subject *jure soli*; he is born out of the King's dominions, and His Majesty cannot be said to be in occupation of the part of the world in which he is born. It seems, therefore, that it is only *jure sanguinis*, that is, as the child of a British subject who satisfies the conditions of section 1 (1) (*b*) of the Act of 1914, amended as aforesaid, that a person born in an aircraft on or over the high seas can be a natural-born British subject.[2] So a child of French parents born on a British airship over the high seas would appear to be French only and not both French and British.

(*b*) *Death* frequently occurs to persons in or hurled from an aircraft while on or over the high seas. It is believed that the place of a death is very rarely, if ever, of importance in English law as a factor in the devolution of property, though the domicile of the deceased at the time of his death regulates a number of matters. There are, however, other cases in which the place of death may be relevant. For instance, I suggest that the Fatal Accidents Acts, 1846 to 1908, can apply to a death occurring to a person in or thrown out of any aircraft on or over the high seas, whatever may be his nationality.[3] Again, under section 27 of the Workmen's Compensation Act,

[1] See Dicey, p. 159, note (*p*).

[2] I am a little puzzled by the proviso in section 1 (1) of the Act, which defines birth within His Majesty's allegiance; it is arguable that the high seas are a place in which His Majesty exercises jurisdiction over British subjects by "lawful means" when they are on board a British ship or in an aircraft (see s. 14 (1) of the Air Navigation Act, 1920, and Article 2 of the Consolidated Order quoted above). This proviso seems to relate to section 1 (1) (*b*) of the British Nationality, etc., Act, 1914, and not to section 1 (1) (*a*) ("dominions and allegiance"), and thus refers to the birth of the father of the *de cujus*.

[3] See in *Davidson* v. *Hill* [1901] 2 K. B. 606, Kennedy, J., at p. 610, and Phillimore, J., at p. 616.

1923, now replaced by the identical section 36 of the Workmen's Compensation Act, 1925, the Workmen's Compensation (Aircraft) Order, dated December 19, 1924, was made, which now applies the provisions of the Act of 1925, with certain modifications, to persons employed as "pilot, commander, navigator or other member of the crew of any aircraft when outside Great Britain"; the aircraft must be registered in the United Kingdom of Great Britain and Northern Ireland, and the owner must reside or have his principal place of business in Great Britain, but compensation is not payable "where the accident causing the injury did not occur during or in connection with the flights (*sic*) taking off or landing of the aircraft." [1]

The Act of 1925 has no application outside the territorial limits of Great Britain and Northern Ireland,[2] apart from the express extension under section 36 discussed above, and a similar extension in the case of masters, seamen, and apprentices under section 35.[3]

§ 45. (*c*) *Marriage.*—We need not concern ourselves with the Foreign Marriages Act, 1892, regulating marriages abroad, between parties of whom one at least is a British subject, solemnized by or before a "marriage officer," *e.g.* a British ambassador, consul, colonial governor, etc., at his official residence. But the provisions of that Act are permissive and neither mandatory nor exhaustive. Nor need we consider the effect of marriage on board a British ship, as we are not prepared to apply, *eo ipso*, and as a matter of common law, the same law to marriages in an aircraft. It is suggested,

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[1] The Order of December, 1924, became operative from April 1, 1925, in virtue of notice given by the Secretary of State for the Home Department in the *London Gazette* of March 6, 1925, under para. 4 of the Order. The Order remained in force after the passing of the Workmen's Compensation Act, 1925, in virtue of the provision in section 50 (2) of that Act, that the repeal of the Act of 1923 (except six sections, not including section 27) should not affect any Order already made thereunder. For the text of the Order, see Statutory Rules and Orders, 1924, No. 1499, and Elliott, *Workmen's Compensation Acts* (9th ed., 1927), p. 703.

[2] *Tomalin* v. *S. Pearson & Son, Limited* [1909] 2 K. B. 61, in accordance with the general presumption as to the ambit of a British Statute.

[3] It is necessary also to bear in mind the effect of conventions made with foreign States under section 37 of the Act of 1925, or similar sections of earlier Acts, *e.g.* with France and Denmark; see Elliott, *op. cit.*, pp. 698–702.

however, that in an aircraft on or over the high seas a British subject can contract a valid marriage by means of the old common law form of marriage *per verba de præsenti*, for Lord Hardwicke's Marriage Act of 1753 abolishing this form of marriage has no effect outside the limits of England and Wales ; this form of marriage may be contracted in the presence of any clergyman in episcopal orders. Moreover, it is possible that, even without the presence of a clergyman, a British subject in an aircraft on or over the high seas can contract a valid common law marriage by a simple exchange of declarations in the presence of witnesses.[1]

It is only in this way, I submit, that is, by virtue of the personal law of at least one of the contracting parties, that a marriage in an aircraft on or over the high seas can be valid. There can be no *lex loci*.

(*d*) *Wills and other Legal Instruments*.—Circumstances exist in which the law of the place where a will is made, or some other legal instrument is executed, becomes relevant in considering the legal effect of the will or other instrument. I submit the view that in the case of a will made, or other legal instrument executed, in an aircraft over land or inland or territorial waters, English law will deal with the matter as if it had occurred upon the subjacent territory or waters. In the case, however, of a will made or other legal instrument executed on or over the high seas there is no *lex loci*, and I submit the view that a court must apply such other system of law, be it the *lex domicilii* of the actor or not, as seems most appropriate in the circumstances.[2] Thus in applying the first section of Lord Kingsdown's Act, 1861, which affords to a British subject in making his will " out of the United Kingdom " a choice of three legal systems, it would be necessary to omit the first—" the law of the place where the same was made."

Similarly, in dealing with those transactions which English law requires to be valid by the *lex situs* as is usually the case with the assignment of movables, it

[1] See Dicey, pp. 686–721 ; Hall, *Foreign Jurisdiction of the British Crown*, §§ 87, 88.

[2] See Spaight, p. 128.

must be recognized that an aircraft and its contents on or over the high seas have no *situs*, and some other system of law must be applied.

The Wills Act, 1837, s. 11, preserves to " any soldier being in actual military service " and any " mariner or seaman being at sea," even if under the age of twenty-one years, the common law right to make a nuncupative will disposing of their personal property, and this right was extended by the Wills (Soldiers and Sailors) Act, 1918, s. 3, to include real property. For the purposes of " soldiers' wills " made " in actual military service " under these two sections, members of the Air Force have been included within the expression " soldier " in that section by section 5 (2) of the Act of 1918 above-mentioned. But there is, I submit, no doubt that this privilege does not extend to civilian members of the crew of an aircraft, either above land or above the sea, even in the case of seaplanes.

In this chapter I have endeavoured to state some of the rules which, with all diffidence, I venture to think an English court would apply in the present state of English law and of private international law. I have spoken of the *lex lata* and not the *lex ferenda*. There is no question that urgent need exists for some international agreement upon these matters, and reference should be made to Dr. Spaight's book on *Aircraft in Peace and the Law* for a valuable survey and criticism of the competing theories which prevailed in the year 1919 and for his own proposals for the solution of these problems.[1]

[1] Many of the topics discussed in this chapter are dealt with by Spaight in Chapters VII. and VIII. of *Aircraft in Peace and the Law* (1919). The following is his " Summary of the Proposals as to Jurisdiction " (at pp. 129, 130):

" One may summarize briefly as follows what has been said in this chapter as to the jurisdiction most appropriate to the various kinds of acts that may be done in an aircraft over foreign territory:

" (1) Contraventions of air regulations agreed to in an international convention would be punishable either by the local State or by the State of the aircraft's nationality.

" (2) Contraventions of the subjacent State's defence, fiscal, or similar laws and regulations would be dealt with only by that State (unless at some future date the courts of the League of Nations deal with them, as being cases tending to disturb good inter-State relations).

" (3) Acts (crimes, torts, contracts, etc.) done in the air by a person taken up at one point in a country and set down at another, without having crossed the frontier, would be treated as done on the ground.

" (4) Murder and other ' common law ' crimes committed in the air,

whether affecting persons on the ground or only those within the aircraft itself, would come under the jurisdiction of either the subjacent State or the State of the aircraft's nationality.

" (5) Save as at (3), torts committed in the air and not affecting in any way persons or property in the subjacent State would come under the jurisdiction of the courts of the country in which the defendant is present and can be served, which would ordinarily be his country of domicile.

" (6) Torts committed in the air but affecting persons or property below would be treated as within the subjacent State's jurisdiction, but the concurrent jurisdiction of another State as at (5) might perhaps be recognized.

" (7) Save as at (3), contracts made in the air would be regarded as made in the ' country of intended performance.'

" (8) Save as at (3), wills made in the air would be treated as made in the country of the testator's domicile.

" (9) Infractions of discipline and questions of the interior economy of the aircraft would be treated (even perhaps if the act in question were done on the ground) as being within the jurisdiction of the courts of the aircraft's nationality.

" The aircraft, it is assumed, would possess the nationality of the country in which it was registered, and that country would be the country in which its headquarters were situated. To meet possible difficulties arising under paragraphs (4) and (6) above, the principle of the ' volume frontier ' might be usefully applied to cases in which the act in question was done in the undefined border atmosphere."

# CHAPTER 6

## THE CONTRACT OF CARRIAGE[1]

§ 46. It is proposed in this chapter to consider the position of the owner (by which term I mean the operator, whether or not in fact the owner) of an aircraft as a carrier of goods and passengers respectively. We shall confine ourselves to general principles, and we shall print in Appendices C and E the provisions of the contracts used by the leading air transport companies. (The case of the owner of an aircraft who does not himself carry but lets out aircraft for the purpose of transport by air will be considered later in the chapter upon " Aircraft Charterparties.")

### CARRIAGE OF GOODS

It will be convenient to discuss in the first place whether the owner of an aircraft carrying goods is *prima facie* a common carrier, and in the second place what his liability is if, or when, he is not a common carrier.

A common carrier is defined in the *Digest of English Civil Law*,[2] § 558, as

> " a person who holds himself out as willing to carry for reward, without special terms, the goods generally, or any particular kind or kinds of goods, of any person who chooses to employ him."

The peculiar liabilities of the common carrier are two-fold : (i) an obligation to carry goods of the kind

[1] For American views, see the American works in the List of Books on p. xi. For French views, Batigne, *De la responsabilité des Compagnies de navigation aérienne dans les accidents* (Paris, 1923) ; Tissot, *De la responsabilité en matière de navigation aérienne* (Paris, 1925) ; Bourhuis, *Des obligations de la responsabilité des Compagnies de navigation aérienne dans le transport de personnes* (Algiers, 1929).

[2] Edited by Edward Jenks, 2nd ed., 1921, this title being the work of R. W. Lee.

usually carried by him for all persons who are willing to pay his reasonable charges and provided that he has room for the goods, and (ii) an unusually heavy degree of liability (exceeding that of the ordinary bailee for reward) which makes him responsible for any loss or damage happening to the goods which he cannot prove to have resulted from the act of God, the King's enemies, " inherent vice," or defects in the goods (including fair wear and tear) or the negligence of the owner of the goods himself.[1] In virtue of this specially onerous liability he is sometimes referred to as an " insurer," though the term is figurative only because he is not an insurer against all risks.

It is important to decide whether a person whose regular employment is the carriage of goods by air is *a priori* capable of being regarded by the law of England as a common carrier or not. It is unnecessary to discuss whether this peculiar status survives as a special case of a formerly more general status of persons carrying on a public employment [2] or is peculiar to the cases of innkeepers and carriers by land or by water and one or two others. Whether the carrier hauls his vehicle by means of human strength along a road or a towpath or employs horses or steam or petrol or the wind which fills his sails, his peculiar status applies except in so far as he may take steps to exclude or modify it, and I can see no reason in principle why the carrier by air is *ex limine* ruled out of the category of common carrier by the fact that, except for the trifling space of time at each end of his transit when his vehicle is taking-off or landing, he performs his task in a different medium, namely, in the air.[3]

It is comparatively rare in England to-day to find goods

[1] See *Digest of English Civil Law*, §§ 559, 562; Macnamara, §§ 9–12; Leslie, *Law of Transport by Railway*, 2nd ed., 1928, §§ I–III; Carver, ch. i. For the history, Holmes, *The Common Law*, pp. 180–205; Holdsworth, *History of English Law*, vol. viii. (1925), pp. 254–273.

[2] The " common innkeeper " is the only other case to-day. See Holmes, *op. cit.*

[3] The American view appears to be the same. See two cases in which two different courts were prepared to hold that an aviator was a common carrier of passengers if the facts had warranted it: *Brown* v. *Pacific Mutual Life Insurance Co.* (1925) 8 F. (2d.) 996, and *North American Insurance Co.* v. *Pitts* (1925) 213 Ala. 102, both in Zollmann, *Cases*.

being carried either by a railway company or a road transport company or a shipowner or a barge-owner upon the naked terms of his common law liability, because it is customary to enter into a special contract defining the extent of the liability. But in so far as these carriers hold themselves out as ready to carry goods of certain kinds or goods generally on behalf of persons willing to pay reasonable charges, their common law liability as to the safe delivery of the goods is a palimpsest upon which their liability by special contract is written. The extent of the common law obligation to receive goods tendered to them for carriage is not so clear. It is doubtful whether it applies to carriers by water.[1] Railway companies are only common carriers as to goods of the kinds which they profess to carry, but they are also subject to a certain measure of compulsion to afford " reasonable facilities " under section 2 of the Railway and Canal Traffic Act of 1854 for the carriage of passengers and goods. Other land carriers are capable of being common carriers and of being subject to an obligation to carry goods of the kind which they profess to carry.[2] Nor does the fact that one of the *termini* is outside the realm prevent a carrier from being a common carrier.[3]

§ 47. *Power of Excluding the Status of Common Carrier.* —There is no room for doubt that the common law permits a carrier whose business is of such a character that *prima facie* he is a common carrier to exclude that status by repudiating it in unambiguous terms or by reserving the right to pick and choose amongst the customers who wish to employ him. A man may carry on the business of a carrier as a public employment and may desire to extend his business and obtain new customers, but if it is proved as a matter of fact that he reserves to himself the right to decline to carry goods of the kind usually carried when offered by particular persons " being guided in his decision by the attractiveness

[1] *Liver Alkali Co.* v. *Johnson* (1874) L. R. 7 Ex. 267 ; 9 Ex. 338 ; Carver, § 5.
[2] Macnamara, §§ 9–12.
[3] *Benett* v. *Peninsular and Oriental Steam Boat Co.* (1848) 18 L. J. C. P. 85 ; *Crouch* v. *London and North Western Railway Co.* (1854) 23 L. J. C. P. 73.

or otherwise of the particular offer and not by his ability or inability to carry having regard to his other engagements," then he does not become a common carrier and escapes both the peculiar liability of a common carrier and the obligation to carry for all indiscriminately.[1] Such an one is often referred to as a " private carrier," that is, " one (*a*) who undertakes to carry for reward on occasion, but not as a public employment, or (*b*) who, although inviting all and sundry to employ him as a carrier for reward, reserves the right to reject their offers of goods." [2] Nor is there any doubt that the common law permits a carrier, whether a private or a common carrier, to take steps by special contract to modify or negative his common law liability in respect of goods being carried by him. The legislature has frequently intervened in the case of certain kinds of carriers to regulate or restrict this power of contracting out of their common law liability; for instance, in the case of " mail contractors, stage coach proprietors, or other public common carriers " by land [3] by sections 4 and 6 of the Carriers Act, 1830; in the case of railway companies by section 7 of the Railway and Canal Traffic Act, 1854, which requires special contracts to be " just and reasonable "; and in the case of shipowners by the Carriage of Goods by Sea Act, 1924, following the example of the Harter Act of 1893 of the United States of America. But in the absence of legislative intervention a common carrier is at liberty to negative or modify his " insurance " liability in respect of the goods carried by him by an unambiguous special contract, and a private carrier is likewise at liberty to contract out of his liability as an ordinary bailee. Such conditions are not contrary to public policy as interpreted by the common law.[4]

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[1] *Belfast Ropework Co.* v. *Bushell* [1918] 1 K. B. 210.

[2] Macnamara, §§ 4 and 9.

[3] It is clear from the preamble and from section 1 that the Act applies only to land carriers, including the land transit of a transport partly by land and partly by water (*Baxendale* v. *Great Eastern Railway Co.* (1869) L. R. 4 Q. B. 244).

[4] See Walton, J., in *Price* v. *Union Lighterage Co.* [1903] 1 K. B. at p. 752. See, however, the Road Traffic Act, 1930, s. 97, which avoids contracts so far as restrictive of liability in respect of death of or injury to passengers in " public service vehicles " as therein defined.

There are, however, two special rules affecting carriers which demand consideration: (i) the duty resting upon all carriers by land or by water, whether common carriers or not, to use express and unambiguous language if they desire to protect themselves against liability for the consequences of the misconduct or negligence of themselves or their servants, and (ii) the warranty of seaworthiness which applies to a shipowner. Of these each in its turn.

§ 48. (1) *Negligence or other Default on the part of the Carrier or of his Servants.*—Of the many decisions which lay down the rule above stated we need only refer to a few. In *Steinman* v. *Angier Line* [1] it was held by the Court of Appeal that an exception contained in a bill of lading purporting to protect a shipowner from liability from losses caused by (*inter alia*) " pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea " did not apply to thefts committed by the stevedore's men who were in the service of the shipowner. Bowen, L.J., said: [2]

> " This question of construction must be decided on the broad principle which has been so long and so constantly invoked in the interpretation of contracts with carriers by sea as well as land, viz., that words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants."

This rule is further illustrated in the important case of *Price* v. *Union Lighterage Co.*,[3] where it was held by the Court of Appeal that a clause whereby barge-owners stipulated that " we will not be liable for any loss of or damage to goods which can be covered by insurance " did not protect them from liability for loss caused by the sinking of a barge owing to the negligence of the barge-owners' servants. " If," said Walton, J., " the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and

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[1] [1891] 1 Q. B. 619 (Lord Esher, M.R., Bowen and Fry, L.JJ.).
[2] At p. 623.
[3] [1903] 1 K. B. 750 (Walton, J.); [1904] 1 K. B. 412 (Lord Alverstone, C.J., Collins, M.R., and Romer, L.J.); *The Pearlmoor* [1904] P. 286.

care in the carriage of goods, he must do so in plain language and explicitly, and not by general words."

The principle was stated by Scrutton, L.J.,[1] as follows:

> "Although they [a railway company] might use exceptions which would free them from liability whatever they were doing, if they want to protect themselves from the consequences of their own negligence, they must do it in clear and intelligible language."

This requirement of an unambiguous exclusion of negligence or other default has been applied to many types of exempting clauses, some specific such as "accidents or damages of the seas, rivers, or navigation" which afforded no protection against a collision caused by the negligence of the carrier's servants,[2] and some of the "omnibus" kind such as occurred in *Price* v. *Union Lighterage Co.* (*supra*). The principle appears to be merely a particular application to carriers of the general maxim *verba chartarum fortius accipiuntur contra proferentem.* As Lord Macnaghten said in *Elderslie Steamship Co.* v. *Borthwick*:[2] "An ambiguous document is no protection."

The precise scope of the rule illustrated by *Price* v. *Union Lighterage Co.*, namely, that a carrier can only effectively protect himself against liability for the consequences of the negligence or other misconduct of himself or his servants by unambiguous language, is becoming better defined as the result of a series of recent cases. It seems that it does not apply to the special contracts of persons who would not in the absence of a special contract belong to the category of common carriers; thus the keeper of a garage[3] who received cars for sale on commission was protected against liability for damage caused by his servant's negligence by a clause providing that "customers' cars are driven by your staff at customers' sole risk"; a company of furniture removers and warehousemen[4] were protected

[1] In *Neilson* v. *London and North Western Railway Co.* [1922] 1 K. B. at p 202; approved by Lord Dunedin [1922] 2 A. C. at p. 271.

[2] [1905] A. C. at p. 96; cited by Carver, § 77.

[3] *Rutter* v. *Palmer* [1922] 2 K. B. 87.

[4] *Turner* v. *Civil Service Supply Association* [1926] 1 K. B. 50; *Fagan* v. *Green and Edwards, Limited, ibid.*, p. 102. See Temperley, *Carriage of Goods by Sea Act, 1924* (3rd ed., 1927), at p. 43.

against a fire caused by their own negligence by the words " the contractors are not responsible for loss or damage caused by fire . . ." The reason is that, since an ordinary bailee is in no event liable except where the loss results from the negligence of himself or his servants, words of exemption, *e.g.* " not liable for loss by fire " would be given no effect at all unless construed as qualifying his liability for negligence, and accordingly such words are normally construed as protecting him in the case of loss by fire even when occasioned by his negligence.[1] On the other hand, in the case of persons who in the absence of a special contract would be common carriers, and thus would be treated by the common law as " insurers," it is quite easy to give an effect to such expressions as " at customers' sole risk," or " not liable for any loss or damage capable of being covered by insurance " without including therein protection against the consequences of their own or their servants' negligence. The *Price* v. *Union Lighterage Co.* rule thus explained applies to carriers in general, both by land and by sea,[2] and I can see no reason why it should not apply equally to carriers by air. That the rule applies to a person who exercises the public employment of a carrier while modifying his common law liability by special contract is clear. But I think it is not yet clear that the rule applies to a carrier who has effectively excluded the common law obligation to carry for all and sundry by reserving a right to pick and choose and thus secures for himself the position of an ordinary bailee whose liability is based on negligence.

§ 49. (ii) *The Analogy of the Warranty of Seaworthiness.* —" A shipowner by contracting to carry goods in a ship, in the absence of express stipulation, impliedly undertakes that his ship is seaworthy." [3] That is, in the words of Lord Blackburn, in *Steel* v. *State Line Steamship Co.*,[4] " what is properly called a warranty, not merely that they should do their best to make the ship

[1] See Bankes, L.J., [1922] 2 K. B. at p. 90.
[2] Carver, §§ 103, 105 ; Macnamara, § 60.
[3] Scrutton, Article 29.
[4] (1877) 3 App. Cas. at p. 86.

fit, but that the ship should really be fit." It is not possible to speak so confidently of the land transport of goods. What is quite clear is that there is no warranty of the absolute fitness of a vehicle provided for the carriage of passengers, the carrier's obligation being merely to provide a vehicle which is " as fit for the purpose as care and skill can render it, and to exercise reasonable care and skill in carrying them." [1] There are *dicta* in favour of a warranty of " landworthiness " of a vehicle for the carriage of goods,[2] but it is not easy to dissociate them from the strict liability of a common carrier, and it is safer not to assert the existence of any warranty of fitness of a vehicle provided for the carriage of goods by land.[3] It seems, therefore, that this implied warranty of seaworthiness is not inherent in the contract of carriage of goods, but is due to something peculiar in the carriage of goods by sea.[4] Lord Justice Scrutton suggests that it may be a relic of a former express warranty contained in contracts of carriage of goods by sea.[5] In these circumstances I submit that the true view is that the common law does not impose upon the air carrier an absolute warranty of airworthiness,[6] but merely places him under a duty to furnish an aircraft as fit as human skill and care can make it.[7] If no warranty of air-

[1] *Digest of English Civil Law*, § 577 ; *Readhead* v. *Midland Railway Co.* (1869) L. R. 4 Q. B. 379 ; *Simson* v. *London General Omnibus Co.* (1873) L. R. 8 C. P. 390.

[2] See *Readhead* v. *Midland Railway Co.* (*supra*).

[3] See Leslie, *Law of Transport by Railway*, 2nd ed., 1928, pp. 32, 33. Macnamara, § 10, is more inclined to recognize the existence of a warranty as to goods. In *Hyman* v. *Nye* (1881) 6 Q. B. D. at p. 690, Mathew, J., said : " The warranty of seaworthiness in the case of a ship has been traced in many recent cases to its source in the ordinary contract for hiring an article for a specific purpose ; and the obligation to provide a roadworthy carriage is not as onerous as the obligation to provide a seaworthy ship, which, in the absence of express terms, is implied in any contract of affreightment (*Steel* v. *State Line Steamship Co.*, 3 App. Cas. 72)."

[4] Scrutton, at p. 98, citing *Kopitoff* v. *Wilson* (1876) 1 Q. B. D. 377. But see Mathew, J., in *Hyman* v. *Nye* (*supra*).

[5] *Ibid.*, at p. 101. Much in the same way as in International law the *rebus sic stantibus* doctrine is probably due to the former practice of inserting in treaties a *clausula rebus sic stantibus*.

[6] See addendum on p. 143.

[7] The distinction between the absolute duty of airworthiness and the qualified duty of supplying a fit vehicle is more theoretical than practical. Even seaworthiness is relative and has to be judged by the standard of technical skill current at the material time, and a shipowner is not bound to alter his vessel by adopting all the latest improvements so long as without them the vessel

worthiness exists in the case of carriage of goods, *a fortiori*, there is none in the case of the carriage of passengers.

It is true that under article 11 of the Aerial Navigation Convention of 1919, " every aircraft engaged in international navigation," and by section 3 of the Consolidated Order " all British aircraft registered in Great Britain and Northern Ireland " and " other British aircraft and foreign aircraft when such aircraft are in or over Great Britain and Northern Ireland," must hold certificates of airworthiness.[1] But it is submitted that mere failure to comply with this obligation would not afford a cause of action against the air carrier to the persons whom or whose goods he carries in respect of loss or damage resulting from unairworthiness.[2] We can infer from these provisions neither the existence of an implied warranty of airworthiness, nor that the existence of a certificate of airworthiness protects the air carrier in any action by a person whom or whose goods he is carrying.

But even if there is in a contract of carriage of goods by air no warranty of airworthiness, there is at least a duty to supply a vehicle as reasonably fit for the transit as human skill and care can make it. Moreover, exceptions in the contract of carriage such as " at customer's risk," will qualify the duty to take care during the

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remains reasonably fit. See Scrutton, L.J., in *Bradley & Sons* v. *Federal Steam Navigation Co.* (1926) 24 Lloyd's List Law Reports, at p. 454. *Per contra*, a land carrier does not escape liability merely by proving that neither he nor his servants have not been negligent if in fact the vehicle is not as fit as human skill and care can make it.

[1] The detailed requirements as to certificates of airworthiness and periodical overhaul and examination are contained in Schedule II of the Consolidated Order. In particular it should be noted that the provisions of clause 8 of that Schedule which apply to British aircraft " carrying passengers or goods for hire or reward " and " plying for public service " as therein defined, require that every day during use such an aircraft must be inspected and certified as fit for flight by a ground engineer licensed by the Government for that purpose. See also clause 8 (2) of the same Schedule as to aircraft carrying for reward but not plying for public service. See also clause 9 (2) of the same Schedule.

[2] See above, pp. 83–85. At the same time, as a matter of evidence, the more numerous and stringent these provisions are, the more difficult it will be in practice to prove negligence against a person who has complied with them. The following cases are instructive upon the effect which the employment of competent and qualified architects and surveyors has upon a shipowner's liability: *W. Angliss & Co.* v. *P. & O. Steam Navigation Co.* [1927] 2 K. B. 456; *Werner* v. *Bergensk Dampskibsselskab* (1926) 42 T. L. R. 265.

transit, but will not qualify the primary duty of supplying a fit vehicle unless that duty is expressly excluded; thus the negligence of a pilot may be covered by such words, but not the negligence of the ground staff.

§ 50. *Effect of deviation.*—It remains to consider whether the analogy of sea and land carriage can be applied in considering the effect of deviation, that is, a voluntary departure from the agreed voyage, upon the terms of a special contract entered into by an air carrier. In the case of a contract of carriage by sea or by land, deviation, in the absence of express stipulation or the necessity of saving life, has a devastating effect upon the special contract by displacing it and stripping the ship-owner of the benefit of its provisions; thereby he is reduced either to the position of a common carrier if the circumstances of his business are such as to place him in that category, or, if they do not, then to the position of an ordinary bailee.[1] It is immaterial whether or not the loss or damage was caused by the deviation or occurred before or during or after the deviation.[2] The basis underlying the legal effect of deviation as stated above is that the prosecution of the agreed voyage is an absolute condition of the special contract, and that failure by deviation to comply with that condition displaces the special contract. There is no reason why the same principles should not apply to the contract of carriage of goods by air.[3]

*Forum competens.*—The question of jurisdiction in actions arising upon contracts of air carriage is common to passenger and goods contracts alike, and will be dealt with later.[4]

§ 51. *The General Transport Conditions.*—After these general remarks, we must note the existence of certain

[1] This statement is a slight over-simplification of the position, and the reader is referred to Scrutton, pp. 303, 304. See Scrutton, L.J., in *Gibaud* v. *Great Eastern Railway* [1921] 2 K. B. at p. 435; Atkin, L.J., in *The Cap Palos* [1921] P. at p. 471; and *London and North Western Railway* v. *Neilson* [1922] 1 K. B. 192; [1922] 2 A. C. 263.

[2] *Joseph Thorley, Limited* v. *Orchis Steamship Co., Limited* [1907] 1 K. B. 243, 660.

[3] Deviation is not very likely to occur in the case of air transport except in the case of danger arising from weather conditions, in which case it would be excusable at common law.

[4] See below, pp. 130, 131.

standard conditions upon the terms of which the principal air transport companies operating in and from England are at present carrying on their business. Imperial Airways, Limited, the leading British company, is a member of the International Air Traffic Association, which comprises practically all the companies operating international air services in Europe. The members of this association have agreed upon certain General Transport Conditions, upon the basis of which they carry and which are incorporated in the passenger tickets, baggage checks, and consignment notes issued by them.

At an international conference held at Warsaw in 1929 by the " Comité international technique d'Experts juridique aëriens," a non-governmental but nevertheless highly representative body, commonly known as " CITEJA," a Convention was signed on October 12, 1929, dealing with the liability of air carriers. At the moment of writing that Convention, in order to bring it into force, requires the ratification of one more party. Its entry into force will be the signal for the adoption by members of the International Air Traffic Association of certain new General Conditions and passenger tickets, baggage checks, and consignment notes. It has therefore been considered desirable to print in the Appendices the existing General Transport Conditions (with a few notes upon them), the Warsaw Convention, and the new General Conditions.

§ 52. *Transferability of Consignment Notes.*—Does the indorsement of a Consignment Note pass to the transferee the property in the goods comprised in it, and can a Consignment Note, like a bill of lading, be regarded as a negotiable instrument in the popular, though not in the strict, sense of the term ?[1] A bill of lading usually makes the goods expressly deliverable to the consignee " or his assigns." The Consignment Notes referred to above contain no such expression. But suppose that they did ? What would be the effect ?

[1] See Scrutton, p. 192. See note (*o*) on that page as to the circumstances in which the indorsee of a bill of lading may be placed in a better position than his indorser. Stoppage *in transitu* is the most important case.

I do not think there can be any doubt as to the correct answer to this question. For some centuries it has been recognized that by the custom of merchants the indorsement of a bill of lading, that is, " a receipt for goods shipped on board a ship . . . stating the terms on which the goods were delivered to and received by the ship," [1] transferred the property in the goods comprised in that bill of lading. The classic exposition of this function of the bill of lading is that of Bowen, L.J., in *Sanders* v. *Maclean*.[2] A bill of lading is essentially a maritime document, and this peculiar capacity incident to it is not shared by the way-bills or consignment notes used in land carriage.[3] The reason why the custom of merchants has attached this quality to the bill of lading may be, as Bowen, L.J., seems to suggest in the passage referred to above, that, when a cargo is at sea it is incapable of physical delivery, and therefore during that period, which may be very long, it was necessary to have a symbol of the goods, the delivery of which would pass the property in them ; otherwise, for commercial purposes they would be immobilized. A further incident was attached to bills of lading by the Bills of Lading Act, 1855, namely, that the consignee or his indorsee shall have the same rights against the shipowner and be under the same liabilities towards him as if the contract contained in the bill of lading had been made with the consignee or indorsee.

I submit the view that an Air Consignment Note is not a document of title, the transference of which passes the property in the goods to which it relates. The custom of merchants prevailing throughout a considerable period could make it so, but that is not the position to-day.[4] Nor does it fall within the provisions of the Bills of Lading Act, 1855, mentioned above.

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[1] See Scrutton, Article 3.

[2] (1883) 11 Q. B. D. at p. 341.

[3] See Leslie, *Law of Transport by Railway* (2nd ed., 1928), p. 102. I am unable to find any statutory or judicial authority for this statement, but I do not think it can be denied. Such a document is not a " document of title."

[4] The custom of merchants as a source of law is not dead : see *Bechuanaland Exploration Co., Limited* v. *London Trading Bank, Limited*, [1898] 2 Q. B. 658.

§ 53. *Stoppage in transitu.*—The unpaid vendor's right of stoppage *in transitu* was probably introduced into England in the seventeenth century.[1] It may be that it originated in the case of sales of goods involving sea transit, but as early as 1743 Lord Hardwicke assumed[2] as a matter of course that it applied to goods being carried by land, and many cases of its application to carriage by waggon or by rail are found in the reports. It is true that amongst the reported cases instances of sea transit predominate heavily, but there is nothing in the intrinsic character of the right (which in no way postulates the existence of a document of title such as a bill of lading) or in the provisions of sections 44 to 46 of the Sale of Goods Act, 1893, which now codify the law relating to it, that seems to me to exclude goods being carried by air from the operation of the right. Section 45 of the Act contains the expression: "Goods are deemed to be in course of transit from the time when they are delivered to a carrier by land or water, or other bailee or custodier for the purpose of transmission to the buyer until . . ." I think the draughtsman used the expression "carrier by land or water" because he knew that to many persons stoppage *in transitu* smacks of the sea and he wanted to negative that impression. I do not think he meant to exclude carriers by air or that the words have that effect. Moreover, section 61 (2) of the Act provides that "the rules of the common law, including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, . . . shall continue to apply to contracts for the sale of goods," which, I think, suffices to remove any doubt that may arise on section 45.

I submit, therefore, that the unpaid vendor may exercise the right of stoppage *in transitu* in the case of goods carried by air.[3]

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[1] *Wiseman* v. *Vandeputt* (1690) 2 Vern. 203, is the earliest case cited by Holdsworth, *History of English Law* (1925), vol. viii., at p. 243, and is frequently referred to in later decisions as the earliest case.

[2] In *Snee* v. *Prescot* (1743) 1 Atk. at p. 248.

[3] See also article 16 of the new General Conditions of Carriage of Goods printed in Appendix E.

## CARRIAGE OF PASSENGERS.[1]

§ 54. (*a*) As to the obligation to carry, there is a considerable body of authority for the proposition that a person who professes to exercise the public employment of carrying passengers becomes, at common law and quite apart from statute, subject to an obligation to carry passengers who are free from objection, for whom he has room, and who are ready and willing to pay his fare and comply with his terms.[2] The judicial authority for this proposition was meagre [3] until *Clarke* v. *West Ham Corporation*,[4] in 1909, where, although one member of the Court of Appeal preferred to base his judgment upon the statutory obligation, Farwell and Kennedy, L.JJ., held that a municipal corporation operating a tramway under statutory powers was under a common law obligation to carry passengers. In so holding the Lords Justices were following the opinion expressed by Holt, C.J., in 1701, in the case of *Lane* v. *Cotton*:[5]

> "Wherever any subject takes upon himself a public trust for the benefit of the rest of his fellow-subjects, he is *eo ipso* bound to serve the subject in all the things that are within the reach and comprehension of such an office, under pain of an action against him."

It is unnecessary for us to examine further the nature and the conditions of this common law obligation, because it will not be denied that if such a carrier expressly reserves to himself the right to pick and choose amongst passengers who tender themselves for carriage he escapes this obligation in the same way as the carrier

[1] For a brief summary of the law prevailing in some of the principal European countries, see Kaftal, *La réparation des dommages causés aux voyageurs dans les transports aériens* (Paris, 1930).

[2] See Macnamara, § 308: "It is true of a carrier of passengers by road as it is of such a carrier by railway that if he holds himself out to the public generally as such a carrier he must receive all persons as passengers who offer themselves in a fit state to be carried and ready to pay the proper fare and conform to all reasonable requirements as to carriage unless his conveyance be already so full that he is unable to carry them. *Clarke* v. *West Ham Corporation*, [1909] 2 K. B. 858."

[3] In *Benett* v. *Peninsular and Oriental Steam Boat Co.*, *supra*, the point was hardly discussed, it being assumed that a common carrier of passengers was bound to receive them.

[4] *Supra*.

[5] 12 Mod. at p. 484.

of goods, as we have already seen. However, in the absence of such a reservation, I see no reason why the carrier of passengers by air should not be subject to the same common law obligation to carry as any other carrier exercising public employment of the carriage of passengers.[1]

(*b*) As regards, however, the liability of the carrier towards his passengers once he has accepted them, the analogy of the common law carrier of goods does not hold good.

In *Aston* v. *Heaven*,[2] Eyre, C.J., after referring to the strict liability of coach-owners in relation to goods, said that " the cases of the loss of goods by carriers and the present (injury to a passenger by the Salisbury stage-coach) are totally unlike," and pointed out that " this action stands on the ground of negligence alone." And in another case of a stage-coach, *Christie* v. *Griggs*,[3] Sir James Mansfield, C.J., pointed out that an injured passenger could only recover if there was negligence in the driving or a defect in the coach for which the coach-owner was to blame.

> " There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was answerable at all events. But he did not warrant the safety of his passengers. His undertaking, as to them, went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance."

The distinction made in these two old cases is recognized to-day in the cases of transport of passengers by sea,[4] by rail,[5] and by road,[6] and has been summarized as a duty (*a*) " to furnish a vehicle for the carriage of (such) passengers as fit for the purpose as skill and care can render it, and (*b*) to exercise reasonable care and skill

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[1] For American views, see above, p. 113 (note (1)).

[2] (1797) 2 Esp. 533.

[3] (1809) 2 Camp. at p. 80.

[4] The actual judicial authority for this widely repeated statement is scanty; see *Readhead* v. *Midland Railway Co.* (1867) L. R. 2 Q. B. at pp. 418 and 427; *John* v. *Bacon* (1870) L. R. 5 C. P. 437; Halsbury, *Laws of England*, tit. " Carriers," vol. iv., pp. 44 *et seq.*; and tit. " Shipping and Navigation," vol. xxvi., pp. 327, 328; Beven, p. 1278.

[5] *Readhead* v. *Midland Railway Co.*, *supra*.

[6] *Aston* v. *Heaven*, *supra*; *Christie* v. *Griggs*, *supra*.

in carrying them; but he does not, in the absence of express agreement, warrant the safety of the vehicle, or the security of the passengers." [1] It is believed that this summary accurately describes the position of the carrier of passengers by air.

§ 55. When we turn to examine the present conditions of the aerial transport of passengers in Great Britain, we find four classes demanding consideration: (i) passengers travelling by regular air services in Great Britain or between Great Britain and the Continent; (ii) passengers using aircraft as " taxis " and engaging them for a journey between two *termini* chosen *ad hoc* by the passenger; (iii) passengers who are taken up for a short trip on payment of a small charge, such as constantly happens in connection with a fête or gala; and (iv) gratuitous passengers who accompany a friend in an aircraft owned or hired by him.

(i) *The General Transport Conditions.*—Imperial Airways, Limited, the leading British company, is, as we have already seen,[2] a member of the International Air Traffic Association, which comprises practically all the companies operating international air services in Europe. The members of this Association have agreed upon certain General Transport Conditions, which, together with certain new General Conditions likely to replace them, are printed in Appendices C and E.

(ii) and (iii). In the case both of " air taxis " and the pleasure flights which take place at a fair or gala or enable passengers to enjoy the sensation of taking their " tea over London," the liability of the owner of the aircraft towards his passengers once accepted is, in the absence of special contract, governed by the principles of the common law which we have endeavoured to state above.[3] It is conceivable that class (ii), the owners of

[1] *Digest of English Civil Law*, § 577.

[2] See p. 123.

[3] Pp. 126–128. In an unreported action entitled *Wootton and others* v. *Air Taxis, Limited* (Record, 1930, W. No. 521), the hearing of which was commenced at the Birmingham Assizes on July 21, 1930, the plaintiffs claimed damages for breach of an agreement by the defendants to exercise reasonable and due care and forethought in carrying them from Birmingham to Hamble, or, in the alternative, damages for negligence. The aircraft crashed within a few minutes

" air taxis," may be under the common law obligation to carry unobjectionable passengers provided that they have not excluded that obligation by their published notices and the other circumstances of their business.

(iv) The fact of the carriage (whether of goods or of persons) being gratuitous does not relieve the carrier of the duty of care. Baron Parke stated the duty as follows:[1] " A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care." This statement of the law was approved by the Court of Appeal in *Harris* v. *Perry*,[2] where a railway contractor was held liable for his servants' negligence in the gratuitous carriage of a person who travelled, for his own convenience, but with the permission of the defendant's servants, on an engine running upon a temporary line constructed by the defendant. And the rule is further illustrated by *Pratt* v. *Patrick*,[3] a case of the negligent driving of a motor-car, which is also of interest as an application of the principle of " casual delegation," the defendant (who was in his car) being held liable for the negligence of a fellow-passenger to whom he had temporarily " entrusted the actual physical management of the car and its mechanical control."

The two judgments quoted above were given in cases in which the negligence occurred in the course of transit. It is believed, however, that a similar duty exists to show reasonable care in the provision of a fit vehicle, to be used by the carrier for a gratuitous journey. Where, however, the transaction is not gratuitous carriage, but the gratuitous loan of a vehicle to be used by the bailee for carriage, it seems that the lender is under no such duty of reasonable care, and that all that the law requires

after the beginning of the journey. The defendants, by their defence, pleaded (*inter alia*) that the plaintiffs' injuries " were due to the usual risks of everyday flying, and the plaintiffs voluntarily undertook the risks and the defendants are not liable therefor." The action was settled, and no argument upon the points of law appears to have taken place. See the *Birmingham Mail* of July 21, and the *Birmingham Post* of July 22, 1930.

[1] In *Lygo* v. *Newbold* (1854) 9 Ex. at p. 305. See also *Beauchamp* v. *Powley* (1831) 1 Moody & Rob. 38, and *Moffatt* v. *Bateman* (1869) L. R. 3 P. C. 115.

[2] [1903] 2 K. B. 219.

[3] [1924] 1 K. B. 488.

is that he should warn the borrower of any defects in the vehicle lent of which he may be aware.[1]

*Passengers' Luggage.*—The basic liability of an air carrier in regard to the luggage of his passengers would appear to be, in the absence of contrary stipulation, that of the ordinary bailee for reward ; he is not liable in the absence of the negligence of himself or of his servants. The air carrier's liability in respect of passengers' luggage is also regulated by the General Conditions of the International Air Traffic Association already referred to.[2]

*Notice of special Conditions of Carriage.*—The question whether a carrier by air has taken the necessary steps to affect a consignor or passenger with notice of the special conditions upon the basis of which he is prepared to carry goods or persons does not seem to involve any peculiar considerations, and reference may be made to the rules governing carriers by sea and by land in this respect.[3]

§ 56. *Forum Competens. Goods and Passengers.*—It is not uncommon to find in commercial contracts which carry out international transactions, or the parties to which are resident or carrying on business in different countries, a clause fixing or purporting to fix the jurisdiction over the contract ; for instance, a clause to the effect that the competent court for the decision of all actions shall be that of the country in which the head office of one of the parties is situated. Such a clause occurs in the existing General Transport Conditions of the members of the International Air Traffic Association, and also, in a modified form, in the future General Conditions which are not yet in force.

When the head office of the air transport company is in England, and an action is brought against it in an English court, no question of *forum competens* is likely to arise. When, however, a consignor or a passenger, who is bound by these conditions, wishes to sue in an English court a carrier whose head office is in another country, it becomes necessary to consider what effect the English courts will give to such clauses as those

[1] Salmond, p. 480 ; *Gautret* v. *Egerton* (1867) L. R. 2 C. P. 371 ; *Coughlin* v. *Gillison* [1899] 1 Q. B. 145 (gratuitous loan of a donkey-engine).

[2] On p. 128.

[3] Halsbury, *op. cit.*, vol. iv., p. 54 ; vol. xxvi., p. 328.

referred to above. The attitude of English law is that if the defendant can in accordance with the Rules of the Supreme Court be served with a writ within the jurisdiction or can be reached by notice of a writ served outside the jurisdiction, an English court has jurisdiction to try the action. If a defendant so served with a writ or notice of a writ objects that the contract out of which the cause of action is alleged to arise provides for a foreign tribunal, the English court will not recognize this stipulation as debarring it from determining the dispute, but will at most consider such a provision as giving it a discretion either to try the action or to stay it until the dispute has been heard before the appropriate foreign tribunal. In the latter case the English court will sometimes impose terms on the defendant who applies to stay the action.[1] In no case will it acknowledge that such a provision absolutely debars it from hearing the case if in its discretion it sees fit to do so, though the tendency of the court is strongly in favour of staying the action in the absence of good reasons to the contrary.[2] In short, a clause of this character does not merely give either party an option to sue the other in the agreed *forum*, but constitutes an agreement that actions must be brought there. Such an agreement is a submission to arbitration within the meaning of section 4 of the Arbitration Act, 1889, and *prima facie* it will be enforced. But if, for instance, a foreign aircraft carrying goods or passengers under contracts containing these clauses crashed in England, and the principal witnesses of the crash were in England, as would probably be the case, there is a strong probability that an English court would allow an English action to proceed.[3]

[1] See, for instance, *The Cap Blanco* [1913] P. 130, where an appeal from an order staying the English proceedings was by leave withdrawn on condition that the defendant shipowner waived a clause whereby claims for compensation "must be made in Hamburg within two months after the notification at the port of destination, otherwise any claim to compensation lapses."

[2] See *Law* v. *Garrett* (1878) 8 Ch. D. 26; *Austrian Lloyd Steamship Co.* v. *Gresham Life Assurance Society* [1903] 1 K. B. 249; *The Cap Blanco, supra; Kirchner Co.* v. *Gruban* [1909] 1 Ch. 413.

[3] See *Kidston* v. *Deutsche Luft Hansa A.-G.* (1930) 38 Lloyd's List Law Reports, 1, where the Court of Appeal declined to stay an English action for loss of luggage brought against a German company whose head office was in Germany. The clause in question in this case will be found on p. 193 of Appendix C to this volume.

## CHAPTER 7

### MARITIME ANALOGIES, APPARENT AND REAL

§ 57. Under this title it will be convenient to discuss a number of miscellaneous questions which frequently arise in the case of shipping and consider how far their analogy has been applied, or is likely to be applied, in the sphere of aerial navigation.

*The General Analogy.*—Partly because aircraft are used for overseas transportation and partly because English-speaking people are familiar with shipping terminology, it has become customary to think and speak of aircraft in terms of ships, and to use expressions such as " air-worthiness," " log-book," " registration," " certificate of competency," " pilot," " bill of lading," " lighthouse," " collision," " red and green lights," etc. But this phraseology is delusive, as I hope to show. As has been indicated in an earlier chapter on Jurisdiction,[1] my view is that as a matter of common law, of the law maritime, and of existing legislation, the analogy of the ship has no *general* application to aircraft. That is to say, we must not assert that an aircraft is a new kind of ship, just as a steamer was once a new kind of ship, and that, therefore, *eo ipso* and as a matter of principle, the law relating to ships applies to aircraft *mutatis mutandis*. At the same time it has already been, and will in future doubtless be, convenient from time to time specifically to apply to aircraft by treaty and by legislation rules which have been found convenient in the case of ships. It will not be surprising if we find that such application is more likely to occur in the case of aircraft operating over or on the sea than it is in the case of those operating on or over the land.

§ 58. *Cases in which the Analogy of the Ship is, wholly or in part, Applied.*

[1] See above, pp. 90–93.

1. *Mutual Permission to Enter National Air Space.*—The permission, which a large number of States have granted to one another under the Convention of 1919 or special Conventions, for the private aircraft of their respective nationals and some of their public non-military aircraft to cross their air space without landing and to land at certain aerodromes is not unlike the corresponding right of innocent passage through marginal waters which customary International Law confers in respect of commercial navigation ;[1] although there is no *right* even for merchant ships to enter the ports of a foreign State, it is the practice to allow them to do so.

2. *Nationality.*—Like a ship (and unlike a motor-car) an aircraft must, by the Convention of 1919, have a nationality, namely, that of the State on the register of which it is entered in accordance with the provisions of the Convention of 1919, of the Act of 1920, and of the Order made under the latter. Moreover, as is provided in the case of a British ship, " no aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to the nationals of that State " (article 7 of the Convention). The same article (7) contains certain provisions, for preventing foreign-controlled companies from being registered as the owners of air craft, which are not paralleled in the case of ships.[2]

3. *Airworthiness.*—An aircraft must hold a certificate of airworthiness from the State whose nationality it bears. In the case of ships there is nothing precisely corresponding to this certificate, though certain types of ships, for instance passenger ships and emigrant ships, must be periodically surveyed on behalf of the Board of Trade, and in fact nearly all ships are periodically

[1] Hall, *International Law* (8th ed., 1924, Pearce Higgins), p. 198, denies the existence of such a right in the case of ships of war, but Oppenheim, vol. i., § 188, considers that a usage to this effect exists, and that as regards " such parts of the maritime belt as form part of the highways for international traffic " ships of war have a " right of passage."

[2] In 1929 it was agreed by an amending Convention to substitute for article 7 the following article : " The registration of aircraft referred to in the last preceding article shall be made in accordance with the laws and special provisions of each contracting State." The amending Convention will not enter into force until it has been ratified by all the contracting parties, which has not yet happened.

surveyed by a " public and quasi-judicial," [1] but not governmental, body known as " Lloyd's Register of Shipping " ; without compliance with the requirements of this body the insurance of the ship would be commercially impracticable. Lloyd's Register has recently started an Aircraft Section.

4. *Certificates of Competency.*—The commanding officer and members of the operating crew of an aircraft must hold certificates of competency and licences issued or rendered valid by that State, as must the officers of nearly all British merchant ships (articles 11 and 12 of the Convention of 1919).

5. *Ship's Papers.*—The aircraft must also be provided with a series of documents closely resembling " ship's papers " [2] (article 19 of the Convention), namely :

(*a*) Certificate of registration ;
(*b*) Certificate of airworthiness ;
(*c*) Certificates and licences of the commanding officer and other members of the crew ;
(*d*) List of passengers ;
(*e*) Bills of lading, and manifest of cargo ;
(*f*) Log-books, namely, Journey Log, and (in the case of aircraft carrying passengers or goods for hire) Aircraft Log, Engine Log, and Signal Log ;
(*g*) If equipped with wireless, the special licence prescribed by article 14.

6. *Cabotage.*—Upon the analogy of what is known in International law as *cabotage*,[3] article 16 of the Convention of 1919 reserves the right to any contracting State " to establish reservations and restrictions in favour of its national aircraft in connection with the carriage of persons and goods for hire between two points on its territory," and article 17 enables any other contracting State to subject to the same reservations and restrictions the aircraft of any State which avails itself of this right, even though it does not itself impose these reservations and restrictions on other foreign aircraft.

[1] See *W. Angliss & Co.* v. *P. & O. Steam Navigation Co.* [1927] 2 K. B. at p. 462.
[2] See Oppenheim, vol. i., § 262. [3] *Ibid.*, §§ 187, 579.

7. *Rules as to Lights and Signals and Rules for Air Traffic.*—Annex D of the Convention of 1919, which is embodied in Schedule IV of the Consolidated Order, prescribes a set of rules as to the lights to be carried by aircraft, the signals to be given by and to aircraft in certain events, and the rule of the road to be followed. These rules are reminiscent of the " Regulations for the Prevention of Collisions at Sea " and the " International Code of Signals " which are binding upon the ships of nearly all maritime States.[1] In particular, the green starboard and the red port lights have been adopted for aircraft. For the purpose of Annex D its preamble provides that " the word ' aircraft ' comprises all balloons whether fixed or free, kites, airships, and flying machines."

8. *Collisions.*—This topic has been examined in the earlier chapter on Jurisdiction,[2] and we have seen that " every aircraft manœuvring under its own power on the water " must " conform to the Regulations for Preventing Collisions at Sea, and for the purposes of these Regulations shall be deemed to be a steam-vessel," with, however, modifications as to the lights to be carried and the sound signals to be given.

9. *Crimes.*—Section 14 (1) of the Act of 1920 substantially assimilates crimes committed on board a British aircraft to crimes committed on board a British ship.[3]

10. *Detention of Aircraft.*—For the purposes of the Act of 1920 and of orders and regulations made thereunder, section 14 (3) of the Act applies section 692 of the Merchant Shipping Act, 1894 (which relates to the machinery of detention and the penalties for proceeding to sea in defiance of it),[4] to aircraft with the necessary modifications.

§ 59. 11. *Wreck and Salvage.*—It seems that the scope of the law of salvage is determined partly by the nature

[1] Oppenheim, vol. i., § 265.

[2] *Supra*, pp. 99–103.

[3] See sections 684–686 of the Merchant Shipping Act, 1894, and Archbold's *Criminal Pleading, Practice and Procedure* (28th ed., 1931), tit. " Offences in the Admiralty Jurisdiction," pp. 30–35, and above, pp. 93, 94.

[4] The causes of detention are different: see Temperley, *Merchant Shipping Acts* (4th ed., 1932, by W. L. McNair), pp. 400, 401.

of the property salved and partly by the locality of the operations. "Only maritime property—that is, a vessel, its apparel, cargo, or wreck—can become the subject of salvage. The saving of other kinds of property, such as a floating dry-dock, or raft of timber, or a buoy, does not give rise to any right of salvage reward." [1] Bowen, L.J., after stating that "with regard to salvage, general average, and contribution, the maritime law differs from the common law," and explaining the rule of the maritime law, said: "No similar doctrine applies to things lost upon land, nor to anything except ships or goods in peril at sea." [2] By "goods" I suppose him to mean the apparel and cargo of a ship.

The common law does not recognize the institution of salvage, which is based upon the Roman law of *negotiorum gestio*, and is impossible to square with the English law of contract or quasi-contract; [3] accordingly if salvage services, such as the extinction of a fire, are voluntarily rendered by or to an aircraft on or over land or non-tidal waters, the matter is dealt with in the same way as salvage services rendered by or to a motor-car on the Great North Road or by or to a yacht upon a land-locked lake; that is to say, no reward is recoverable, and the salvor, even though he may have injured himself or his property, is entirely at the mercy of the owner of the salved property. In order, therefore, that the maritime law of salvage should apply to aircraft when "on or over the sea or tidal waters," express statutory enactment was considered necessary, or at any rate desirable.

Article 23 of the Convention of 1919 provides that "with regard to the salvage of aircraft wrecked at sea the principles of maritime law will apply in the absence of any agreement to the contrary." [4]

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[1] Kennedy, *Law of Civil Salvage* (2nd ed., 1907), p. 2, and *The Gas Float Whitton*, No. 2 [1896] P. 42; [1897] A. C. 337, a decision which is criticized by Marsden in *L.Q.R.*, xv. (1899), pp. 353–366. See also Carver, § 323.

[2] In *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. at p. 249.

[3] See, however, Winfield, *The Province of the Law of Tort*, Tagore Lectures of 1931, who classifies salvage as "pure quasi-contract" (p. 155). I venture to suggest that it is better to leave salvage to the law maritime and not to attempt to squeeze it into the category of quasi-contract.

[4] The Pan-American Convention of 1928 on Commercial Aviation contains similar provisions (Articles 26 and 27).

Accordingly, section 11 of the Act of 1920 goes further and provides as follows :

> " The law relating to wreck and to salvage of life or property, and to the duty of rendering assistance to vessels in distress (including the provisions of the Merchant Shipping Acts, 1894 to 1916, and any other Act relating to those subjects), shall apply to aircraft on or over the sea or tidal waters as it applies to vessels, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft to any property or persons in any case where the owner of a ship would be so entitled :
>
> " Provided that provision may be made by Order in Council for making modifications of and exemptions from the provisions of such law and Acts as aforesaid in their application to aircraft, to such extent and in such manner as appears necessary or expedient."

In pursuance of this section an Order in Council (S. R. O. 1921, No. 1286) has provided that section 557 of the Merchant Shipping Act, 1894 (which prevents claims for salvage services rendered by His Majesty's ships (other than tugs and special salvage vessels) from being brought but permits the officers and crew to sue for salvage services after obtaining the consent of the Admiralty), shall apply to aircraft, and that the word " ship " shall include aircraft ; that every court having Admiralty jurisdiction shall have jurisdiction over claims under the above quoted section of the Act and under this Order ; that this jurisdiction may be exercised either by proceedings *in rem* or by proceedings *in personam ;* that the expression " wreck " in certain sections of the Merchant Shipping Act, 1894 (which deal with the reporting of " wreck " to the Receiver of Wreck and its subsequent custody and disposal), " shall include any aircraft or any part thereof or cargo thereof found lying derelict . . . upon or near the shores of the seas surrounding the United Kingdom or the tidal waters thereof or any ports or harbours thereof."

The same Order contains a number of consequential provisions and modifications, among which it will be noticed that section 6 of the Maritime Conventions Act, 1911 (which deals with the general duty to render

assistance to persons in danger at sea), and section 5 of the Merchant Shipping (Convention) Act, 1914[1] (which deals with the obligation to render assistance on receiving a wireless distress call), do not apply in the case of aircraft.

In short, when salvage services are rendered by or to an aircraft which is " on or over the sea or tidal waters," [2] she is to be regarded as a ship, and the law relating to ships (with the minor modifications above mentioned) and the jurisdiction of courts having Admiralty jurisdiction govern the proceedings for a salvage award. And those proceedings may take the form of an action *in personam* or an action *in rem*.

§ 60. *Cases in which the Analogy of the Ship is Rejected.*—We shall now consider certain maritime institutions and principles which, it is submitted, do not apply to aircraft.

1. *General Average.*—A modern statement[3] of " general average " runs as follows :

> " All loss which arises in consequence of extraordinary sacrifices made or expenses incurred for the preservation of the ship and cargo comes within general average, and must be borne proportionately by all who are interested.
>
> " To give rise to a claim for general average contribution :
>
> " 1. There must be a common danger, which must be real, and not merely apprehended by the master, however reasonably.
>
> " 2. There must be a necessity for sacrifice.
>
> " 3. The sacrifice must be voluntary.
>
> " 4. It must be a real sacrifice, and not a mere destruction and casting off of that which had become already lost and consequently of no value.
>
> " 5. There must be a saving of the imperilled property through the sacrifice.
>
> " 6. The common danger must not arise through any default

[1] This Act, after repeated postponements of its coming into force, has now been superseded by the Merchant Shipping (Conventions) Act, 1932.

[2] It will be noticed that the words in inverted commas do not occur in the sentence in section 11 of the Act of 1920 which directly confers a right to a reward upon the owner of an aircraft rendering salvage services, but there seems little doubt that they constitute a condition of the right to a reward. For instance, the owner of an aircraft which rendered salvage services upon a land-locked lake or a non-tidal part of a river would not be entitled to a salvage reward because the owner of a ship in these circumstances would not be entitled.

[3] Scrutton, Article 108.

for which the interest claiming a general average contribution is liable in law . . ."

More tersely, it is defined by Arnould [1] as

" a contribution by all parties in a sea adventure, to make good the loss which has been sustained by one or more of their co-adventurers from sacrifices made, or expenses incurred, for the preservation of the whole."

The origin of this institution is to be found in the Rhodian Law: *si levandæ navis gratia jactus mercium factus est, omnium contributione sarciatur quod pro omnibus datum est*, and it has now become part of the law of England.[2] Does it apply to aircraft? An airship, for instance, gets into trouble and finds it imperative to lighten herself by throwing overboard a portion of her cargo—a very likely contingency. Apart from the terms of any special contract of carriage, can the owner of the cargo thus sacrificed recover any contribution towards his loss from the owners of the other interests which thereby were saved?

I have no hesitation in answering this question in the negative. The principle of general average is based upon the plainest principles of justice, but it requires more than that to make it part of the law of England. A motor lorry transporting a mixed cargo from Manchester to London catches fire. The obvious thing for the driver to do is to drive it into a fortunately adjacent pond and extinguish the fire. A portion of the load is damaged by water. The principles of general average do not apply, and apart from the terms of any special contract the owner of the damaged goods can recover no contribution from the owners of the property saved by this expedient; the reason being that upon land that part of the law of England known as the law maritime does not apply. Nor can I see any reason why it should apply, without express enactment, to an aircraft and its cargo, even when it happens to be operating on the surface of the sea including tidal waters; the water

[1] *Marine Insurance* (11th ed., 1924), § 908.

[2] Digest, XIV. 2. 1 pr.; Ashburner, *The Rhodian Sea-Law* (1909); Scrutton, *Roman Law in the Law of England* (1885), p. 181; Arnould, *op. cit.*, § 908, note (*g*); *Burton* v. *English* (1883) 12 Q. B. D. at p. 223.

is not its normal element, and such an operation (apart from taking-off and landing) would be abnormal. General average applies to a " sea adventure," and I submit that it can only apply where a ship is involved in that adventure.[1]

§ 61. 2. *Maritime Liens.*—That portion of the law of England known as the law maritime recognizes the existence of a certain kind of lien distinct from the possessory lien of the common law and from the lien of equity, known as " maritime lien." [2] It is a peculiar and very powerful type of lien, for it binds the *res* into whosesoever hands or ownership it may have passed, and even avails against the *bona fide* purchaser without notice, the mortgagee and the judgment creditor. It arises from (*a*) damage done by the *res* by collision; (*b*) salvage services rendered to the *res;* (*c*) bottomry bonds securing the payment of money upon the ship and/or cargo and/or freight; (*d*) *respondentia* bonds securing the payment of money upon cargo; (*e*) liability for the payment of seamen's wages. This maritime lien is enforceable by means of the peculiar Admiralty procedure known as an action *in rem*, but whether or not the lien is historically the foundation of the right to arrest in an action *in rem* is a matter of doubt.[3] In addition, the master of a ship has received by statute [4]

[1] For the origin and history of General Average, see Lowndes, *Law of General Average* (6th ed., 1922), pp. 1–54. The following passage (p. 53) requires quotation: " The doctrine of general average, as we have seen, is derived from the maritime law, and there is no authority at common law for extending it to property not engaged in a common maritime adventure in the nature of a voyage " (citing Bowen, L.J., in *Falcke* v. *Scottish Imperial Insurance Co.* (1886) 34 Ch. D. 234, 248, and Lush, J., in *Crooks* v. *Allan* (1879) 5 Q. B. D. 38, 40: " Goods may be damaged in their transit in ship or on the railway, but general average contribution can only arise in respect of damage on ship "). Thus if a fire breaks out in A's warehouse on land, which contains goods belonging to B, and the goods are damaged by water used to extinguish the fire, any suggestion that B is entitled to a contribution from A towards his loss has never been entertained. The case of a ship or hulk used as a floating warehouse may be thought more doubtful, but it is submitted that as the vessel is not used in navigation, there is no maritime adventure common to her and the goods which she contains, and no right of contribution between their respective owners (citing *European and Australian Royal Mail Co.* v. *P. & O. Steam Navigation Co.* (1866) 12 Jur. N. S. 909).

[2] For a short treatment, see Smith's *Mercantile Law* (13th ed., 1931, Gutteridge), pp. 709–711.

[3] See Marsden, at p. 84.

[4] Merchant Shipping Act, 1894, s. 167.

a lien for disbursements made by him on behalf of the ship and for his wages.

The opinion which I submit is that these maritime and statutory liens find no parallel in the case of aircraft, except as regards certain incidents of a lien for salvage services contained in the above-mentioned sections of the Merchant Shipping Act, 1894, which have been expressly applied by Order in Council to aircraft.

3. *Claims for "Necessaries," including Repairs.*—It has been considered desirable to reserve this topic for treatment in the next chapter.

§ 62. *Is an Aircraft "Goods"?*—In this chapter it is perhaps convenient to deal also with the question whether an aircraft is "goods" within the meaning of that term as used in the Sale of Goods Act, 1883, for it is known that this is a matter which has already occasioned difficulty. By section 62 (1) of the Act

> "'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal movables except money. . . ."

In a number of cases [1] it has been assumed that a ship is "goods" for the purposes of the Act, and in *Behnke* v. *Bede Shipping Co., Limited*,[2] Wright, J., expressly held to this effect after argument, and applied section 4 of the Act to a contract for the sale of a ship; moreover, he made an order for the specific delivery of the ship as "specific or ascertained goods" under section 52 of the Act. But a ship is not goods for all purposes. In *Hooper* v. *Gumm*,[3] Turner, L.J., adopting a passage in Abbott's *Law of Merchant Ships*, said: "A ship is not like an ordinary personal chattel; it does not pass by delivery, nor does the possession of it prove the title to it. There is no market overt for ships." This statement has been generally accepted as sufficient authority for the inapplicability of the rule of market overt to ships,

[1] For instance, *Sir James Laing and Sons, Limited* v. *Barclay, Curle and Co.*, [1908] A. C. 35, and *In re Blyth Shipbuilding and Dry Docks Co.*, [1926] 1 Ch. 494. See also *Meering* v. *Duke* (1828) 2 M. and Ry. 121.

[2] [1927] 1 K. B. 649.

[3] (1867) L. R. 2 Ch. at p. 290.

and I do not doubt its correctness, though I do not think it was necessary for the decision. Its correctness seems to me to follow from the very nature of a ship and of a market overt. Market overt is " an open, public, and legally constituted market." [1] Outside the City of London, market overt denotes a particular piece of ground set apart either by the original charter or by custom for the sale of particular goods ; the public exposure of the goods sold upon that piece of ground is an essential condition, and the decided cases seem to me to postulate a shop or stall or similar place in or at which the property is exposed and sold. It is difficult to see how a ship could satisfy these conditions, and I am inclined to think that for a " market " in this highly technical sense a piece of *terra firma* is essential.

The novelty of the article sold is no objection to the applicability of the rule of market overt, and there is some authority [2] for saying that the novelty of the market is no objection. I can see no reason why, the essential conditions of market overt being present, the peculiar incidents of a sale in market overt should not apply to the sale of a motor-car or a wireless set or an aircraft. I submit, therefore, that an aircraft is " goods " for the purposes of the Sale of Goods Act, 1893, including provisions regulating sales in market overt.

I am also of opinion that it is a " personal chattel " for the purposes of the Bills of Sale Acts, 1878 and 1882. In view of the fact that, by virtue of Schedule I (3) of the Consolidated Order, changes in the ownership of a registered aircraft must be notified to the Air Ministry, it is arguable that Parliament ought to place transfers of registered aircraft outside the Bills of Sales Acts just as " transfers or assignments of any ship or vessel or any share thereof " have by section 4 of the Bills of Sale Act, 1878, been excluded from the scope of the Acts of 1878 and 1882.[3] If the register of aircraft can be modified so

[1] *Per* Jervis, C.J., in *Lee* v. *Bayes* (1856) 18 C. B. at p. 601. For a good account of market overt, see J. Walter Jones, *Bona Fide Purchase for Value of Goods Improperly Obtained* (1921), pp. 34–49.

[2] *Ganly* v. *Ledwidge* (1876) Ir. Rep. 10 C. L. 33, in the Court of Queen's Bench Division in Ireland, and *Delaney* v. *Wallis* (1884) 14 L. R. Ir. 31, in the Irish Court of Appeal.

[3] See *Gapp* v. *Bond* (1887) 19 Q. B. D. 200.

as to record mortgages of aircraft, there is no reason why that means of notoriety of the creation of mortgages should not, as in the case of ships, suffice ; but at present the objects of the register have nothing to do with questions of title.

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## ADDENDUM

(Footnote (6) on p. 120.)

It has been suggested to me that the real justification for the existence of the warranty of seaworthiness is that the sea is a medium unfamiliar except to them " that go down to the sea in ships, that do business in great waters," and that likewise the air is unfamiliar except to aviators, whereas the land is familiar to all of us. But if that were the justification, it ought also to apply to the carriage of passengers by land, and it does not. This is what attracts me to the explanation of the origin suggested by Lord Justice Scrutton above.

After this book had passed into page-proof my attention was drawn to the decision of Reed, J., *Strand* v. *Dominion Airlines, Limited*, in the Supreme Court of New Zealand on December 19, 1931. This was an action by the widow and child of a passenger who had been killed while being carried for hire in one of the defendants' aeroplanes upon the terms of a ticket whereby the passenger was to " travel entirely at his own risk, and the Company or its Servants shall not be liable to any person for any loss or accident or delay (arising from any cause or negligence whatsoever) suffered by the passenger or his luggage." Nevertheless, the learned judge held the defendants liable, partly on the ground that the terms of the ticket did not protect the defendants from liability for the consequences of the breach of duties laid upon them by the Aviation Act, 1918, and regulations made thereunder (upon this point, see above at p. 85, where it is submitted that English law would be different), and partly on the ground of the breach of implied conditions that the aeroplane was airworthy and that the pilot held the certificate required by law of a pilot who carries passengers for hire (citing *Steel* v. *State Line* (1877) 3 App. Cas. 72, and *The West Cock* [1911] P. 23, *ibid.* 208). I beg leave to doubt whether an English Court would imply these conditions.

## CHAPTER 8

### THE COMMON LAW POSSESSORY LIEN, AND CLAIMS FOR NECESSARIES

§ 63. The rights of an aerodrome proprietor who supplies fuel or other necessaries to, or effects repairs upon, aircraft, especially foreign aircraft, constitute a matter of such increasing importance that it is desirable to treat it in some detail. We need not concern ourselves with his personal right of action, but must examine his rights against the aircraft itself.

#### A. *The Common Law Possessory Lien.*

(*a*) The rights of a person who bestows labour upon an aircraft so as to improve its condition are governed by the common law. He has the common law possessory lien which ceases with loss of possession and not the maritime lien which is independent of possession and avails even against the *bona fide* purchaser with notice. To create this possessory lien something more than mere storage [1] or even maintenance *in statu quo* [2] is required. Some improvement or increase in value is necessary.

(*b*) The common law possessory lien is in certain circumstances available against the owner of the chattel upon which labour is bestowed, even when he is not the person who gave the order for work to be done upon it. For instance, the repairer's lien avails against the owner if either expressly or by implication the person ordering the repairs had the authority of the owner, or was under a duty to the owner, to keep the chattel in good condition and repair.[3] This is so even when the chattel is the subject of a hire-purchase agreement, and it is the hirer

[1] *Sanderson* v. *Bell* (1833) 3 L. J. Ex. 66.
[2] *Hatton* v. *Car Maintenance Co.*, [1915] 1 Ch. 621.
[3] *Williams* v. *Allsup* (1861) 10 C. B. N. S. 417; 30 L. J. C. P. 353, where a ship repairer's lien prevailed against a mortgagee.

who gives the order for the repairs, as occurred in *Keene* v. *Thomas*,[1] where the hirer had agreed by the hire-purchase agreement " to keep and preserve the said dog-cart from injury," and in *Green* v. *All Motors, Limited*,[2] where the hirer had agreed to " keep the car in good repair and working condition." In *Keene* v. *Thomas* instalments of the hire were in arrear; in *Green* v. *All Motors, Limited*, there had been no default. Even a term in the hire-purchase agreement purporting to prohibit the hirer from creating a lien for repairs will not preclude the arising of a possessory lien in favour of a repairer.[3]

(*c*) If the person ordering the repairs is the servant of the owner of the aircraft acting within the scope of his employment, the repairer would appear to be in an even stronger position.[4]

(*d*) The presumption of authority to incur a lien for repairs enforceable against the owner is in most cases likely to be particularly strong in the case of an aircraft, because the owner knows that unairworthy aircraft may be detained by governmental authority, and that aircraft registered in Great Britain must be examined and certified as fit for flight within a short period prior to taking off.

(*e*) The supplier of fuel and other necessary things to an aircraft is not in so strong a position as the repairer, as the supplier has no lien on the aircraft and, once he has parted with the things supplied, no lien on them.

### § 64. B. *The Statutory Rights of Action* in rem *against a Ship for Necessaries and of Arrest*

(*a*) Let us contrast the position of the person who supplies fuel to, or executes repairs upon, an aircraft with the person who does the same thing for a ship. The latter has a possessory lien for repairs (though not for goods supplied); in England, so the House of Lords has decided, he has not got a maritime lien,[5] though in many countries which follow Roman law he has. But

[1] [1905] 1 K. B. 136.
[2] [1917] 1 K. B. 625.
[3] See *Albemarle Supply Co.* v. *Hind* [1928] 1 K. B. 307.
[4] *Hussey* v. *Christie* (1808) 9 East, at p. 433.
[5] *The Heinrich Bjorn* (1885) 10 P. D. 44; (1886) 11 App. Cas. 270.

any person who supplies " necessaries " to a ship has under the Supreme Court of Judicature (Consolidation) Act, 1925, re-enacting certain sections of the Admiralty Courts Act of 1840 and 1861, a right to take proceedings *in rem* against the ship (in the conditions therein mentioned) and by consequence a right to arrest the ship. The right to arrest is not the same thing as a maritime lien ; it does not prevail against a subsequent purchaser of the ship, and it does not arise until an action is instituted. The right to take proceedings *in rem* and to arrest was created as to foreign ships by the Act of 1840, and as to British ships by the Act of 1861. The term " necessaries " has been held to include " repairs." [1]

(*b*) Does this statutory right to take proceedings *in rem* and to arrest in order to enforce a claim for necessaries (including repairs) supplied to a ship apply to aircraft ? It is submitted that, since the right is the creature of statute, it is upon the words of the statute, namely, section 22 (1) (*a*) (vii) of the Supreme Court of Judicature (Consolidation) Act, 1925, repealing and substantially re-enacting section 6 of the Admiralty Court Act, 1840, and section 5 of the Admiralty Court Act, 1861, that the answer must depend. Section 22 of the Consolidating Act of 1925 provides that :

> (1) " The High Court shall, in relation to admiralty matters, have the following jurisdiction (in this Act referred to as admiralty jurisdiction), that is to say : ' (*a*) Jurisdiction to hear and determine any of the following questions or claims . . . (vii) Any claim for necessaries supplied to a foreign ship whether within the body of a county, or upon the high seas, and, unless it is shown to the court that at the time of the institution of the proceedings any owner or part owner of the ship is domiciled in England, any claim for any necessaries supplied to a ship elsewhere than in the port to which the ship belongs.'
>
> (*b*) " Any other jurisdiction formerly vested in the High Court of Admiralty. . . .
>
> (3) " In this Act, unless the context otherwise requires, the expression ' ship ' includes any description of vessel used in navigation not propelled by oars."

[1] *The Waban* (1855), and other cases cited in Pritchard's *Admiralty Digest*, tit. " Necessaries," p. 1160, and *The Colorado* [1923] P. 102.

The repealing Schedule (vi) of the Act of 1925 repeals section 6 of the Act of 1840 and section 5 of the Act of 1861, and although the language of the re-enacted section quoted above is far from being identical with that of the two old sections I think we may safely assume that in substance it re-enacts the two old sections.

(*c*) Turning to the definition of " ship," the following considerations lead me to the conclusion that an aircraft does not fall within the definition of " ship " quoted above.

§ 65. (*d*) The definition of " ship " in the Act of 1861 is the same as that contained in section 742 of the Merchant Shipping Act, 1894, which also tells us that " ' vessel ' includes any ship or boat or any other description of vessel used in navigation." " Vessel " is a wider term than " ship." [1] I think that there are two notions inherent in the words " ship " and " vessel." The first is that they denote something which normally is *in the water*, either in a position of rest or in motion; the second is that they denote something hollow (*i.e.* a vessel) of which a substantial part is normally submerged and causes a corresponding displacement of water. I do not think that these terms can apply to objects whose normal habitat is the land or the air, and I do not think that the fact that such an object is capable of resting on the surface of water and even moving upon the surface makes it a ship or vessel. A vessel originally means a hollow receptacle, and it is because ships are essentially hollow receptacles that the word is applied to ships. The *Concise Oxford Dictionary* defines a ship as " any sea-going vessel of considerable size." The essential notion in " ship " is, I think, that it is something which can be navigated, that is, which can move on the water under some power, be it wind or steam or oars, or can be towed. There are numerous decisions on the terms, and I do not find them particularly helpful. It may, however, be mentioned that a raft of timber floating in a harbour was held in *The Raft of Timber* [2] to be not a " ship or sea-going vessel " within the Act of 1840. In *The Gas Float Whitton*

[1] On the word " vessel " see *Gapp* v. *Bond* (1887) 19 Q. B. D. 200.
[2] (1844) 2 Wm. Rob. 251.

(No. 2),[1] it was held that a gas-float moored in the river Humber, 50 feet long and 20 feet broad, shaped like a ship, incapable of being used for navigation and almost impossible to tow, was in no sense a ship or part of a ship or its apparel or cargo so as to be subject to the Admiralty jurisdiction as the object of a salvage award. Mere presence on the sea does not suffice to make an object a fit subject-matter for a salvage award. The case of *Merchant's Marine Insurance Co.* v. *North of England Protecting and Indemnity Association*[2] afforded the Court of Appeal an opportunity of interpreting the expression " other than ships and vessels " occurring otherwise than in an Act of Parliament, namely, in the rules of an indemnity association. They held that a pontoon with a crane fixed on it was not a " ship or vessel " within those rules. The pontoon was " in the shape of a vessel to float on the water and provide a platform for a crane to be used on the water." The pontoon " had no motive power of its own, no rudder, . . . and though it was capable of being moved, it was so unseaworthy that it could only go a short distance, and that only in fair weather." Scrutton, L.J., considered that the matter resolved itself into a question of fact. The case is instructive, at any rate, on the point that an object may float and may be capable of being moved and yet not be a " ship or vessel." Moreover, it seems that regard must be had " to the purpose for which it was constructed and the use to which it was put." Mere presence on the sea in a harbour does not make it a " ship or vessel." [3]

It seems to me that " navigation " is the controlling word in the definitions of " ship " which we are considering, and I do not see how aerial transport can be called " navigation " except in a metaphorical sense. " Navigation " must be interpreted having regard to the

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[1] [1897] A. C. 337.
[2] (1926) 43 T. L. R. 107.
[3] For decisions upon the words " ship " and " vessel " in the Admiralty Courts Act of 1840 and 1861, see Williams and Bruce, *Admiralty Practice* (3rd ed., 1902), pp. 73, 74; and as to the Merchant Shipping Acts, see Temperley, *Merchant Shipping Acts* (4th ed., 1932), pp. 421–425. See also *The Titan* (1923) 14 Lloyd's List Law Reports 484.

common use of the word—particularly, I suggest, at the date of the statute containing it. In *Mayor of Southport* v. *Morris*,[1] it was held that an electric launch of three tons burthen, operating on an artificial lake on the foreshore half a mile long and 180 yards wide and carrying up to 40 passengers, was not within the definition of "ship" contained in the Merchant Shipping Act, 1854, which is the same as that quoted above from the Act of 1894.

(*e*) Moreover, the reference to oars contained in section 22 of the Supreme Court of Judicature (Consolidation) Act quoted above seems to me to be significant as indicating navigation in a medium, namely, water, in which it is in certain circumstances possible to use oars.[2]

(*f*) Again, in that section the "ship" is spoken of as belonging to a "port," and aircraft are not registered in a port but in a State.

(*g*) Again, it is noteworthy that the legislature is quite capable of giving a more extensive definition to a ship when it wants to do so: *e.g.* the Foreign Enlistment Act, 1870, s. 30, says that a "ship shall include any description of boat, vessel, floating battery or floating craft; also any description of boat, vessel, or other craft or battery, made to move either on the surface or under water, or sometimes on the surface of and sometimes under water."

And by section 7 of the Territorial Waters Jurisdiction Act, 1878, "'ship' includes every description of ship, boat, or other floating craft."

Finally, there is the appeal to common sense. Parliament in 1840 and 1861 cannot have meant to legislate for an entirely unknown form of transport operating in a new medium, the air. It is perfectly reasonable to argue that motor-vessels or electrically-driven vessels, or

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[1] [1893] 1 Q. B. 359.

[2] The repealed section 6 of the Act of 1840 contained the expression "any foreign ship or sea-going vessel." If "ship" is included in "vessel," as I believe it to be, then I think "ship or sea-going vessel" means "sea-going ships and sea-going vessels." The fact that a ship could go to sea if she wanted to does not make her a sea-going ship (*Salt Union* v. *Wood* [1893] 1 Q. B. 370, 374), and I think that an aircraft which does not in fact go to sea, though capable of flying across a stretch of water, could not be regarded as a sea-going ship or vessel and was therefore not within the Act of 1840. This point is not directly relevant to the Act of 1925, but is of interest.

even submarines, were within such legislation, for they are *in pari materia*. But the air is a different thing. In *Sharp* v. *Wakefield*,[1] Lord Esher said that the usual rule is that " the words of a statute must be construed as they would have been the day after the statute was passed . . .," which, however, I think, is a trifle too strict. But, it will be said, we are dealing with a statute passed in 1925. By that time Parliament had passed several statutes specifically dealing with aircraft and had, in certain cases noticed above, expressly applied to them the maritime analogy (evidently considering that express enactment was required to produce this effect). It is, therefore, inconceivable that Parliament should in 1925, indirectly and by a side wind, have included them within the general jurisdiction of Courts of Admiralty as " ships."[2]

§ 66. (*h*) In these circumstances, I submit that the ordinary aircraft built to take off from the land and to alight on the land are not within section 22 (1) (*a*) (vii) of the Judicature Act of 1925; nor do I think that the fact that they are fitted with floats which in the case of an emergency might keep them afloat on water for a reasonable time makes any difference. I cannot speak with the same emphasis of the true hydroplane which habitually manœuvres under her own power both in beginning and in finishing her flight, but I have a very strong feeling that she, too, is of the air and is not a " ship " or " vessel " within the Act of 1925. The air is her true medium; the water is a mere incident. She operates *on* it rather than *in* it, and I think it unlikely that she is a " ship " or " vessel " under this Act. It is, however, arguable that the taxi-ing of a hydroplane amounts to navigation and brings her while taxi-ing at any rate within the Act.[3] There is another consideration, namely, the probable reluctance of any court to give a decision which would have the effect of applying, almost *en bloc*,

[1] (1888) 22 Q. B. at p. 242.

[2] For a number of cases on the point whether mechanical inventions such as bicycles fall within the general terms of statutes passed before they were dreamed of, see Maxwell, *Interpretation of Statutes* (7th ed., 1929), p. 235.

[3] As to the meaning of " navigation " under the Merchant Shipping Act, 1894, see *Weeks* v. *Ross* [1913] 2 K. B. 229.

our vast body of shipping legislation to aircraft, to which the greater part of that legislation is wholly inapplicable.

There is one further consideration, which turns upon the Convention of 1919, by article 2 of which

> "Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed."

I think that there is no doubt that "freedom of innocent passage" includes landing and departure, the more so as another article (15) expressly deals with the case of crossing the air space of another State without landing. Moreover, it will be noticed that for the purposes of section 13 of the Act of 1920 (Infringement of Patents) "passage" includes "all reasonable landings and stoppages in the course or the purpose of the passage."

It can hardly be said that the existing common law possessory lien for work done infringes this treaty right of passage, because this lien has for centuries been a risk to which any chattel brought into England is exposed. But it is at least arguable that if the right of action *in rem* against ships and the right to arrest ships upon claims for necessaries, re-enacted by the Supreme Court of Judicature (Consolidation) Act, 1925, were applied to aircraft, this would constitute an infringement of the Convention. That does not necessarily constitute an argument against the applicability of these rights to ships, because the statute takes precedence over the Convention. But it means that a court would be reluctant to adopt such a construction of the Supreme Court of Judicature (Consolidation) Act, 1925, and that, if it did, Parliament would probably be invited to put the matter right. It will be noticed that in order to avoid the detention of aircraft on the ground of infringement of patents, designs and models express provisions were considered necessary, namely, article 18 of the Convention of 1919 and section 13 of the Act of 1920.

# CHAPTER 9

## AIRCRAFT CHARTERPARTIES

§ 67. When an aircraft is hired, it is submitted that, in the absence of contrary stipulations, the duty of the letter is to provide a vehicle as fit for the particular voyage known to him to be intended as care and skill can render it; he is not an insurer against all defects, but is only responsible for the consequences of defects which care and skill can guard against.[1] It seems that his duty is not as high as the shipowner's warranty of seaworthiness.[2]

There is not much which can at present usefully be written upon the hiring or chartering of aircraft, as practice has not yet become standardized. The terms of the agreements vary according to the circumstances of the case, and no standard form has yet been evolved. There would appear to be no reason why the agreement should not, as in the case of the chartering of ships, take one of two forms; in the case of a ship, "a charter may operate as a demise or lease of the ship itself, to which the services of the master and crew may or may not be superadded," with the result that "the charterer here becomes for the time the owner of the vessel; the master and crew become to all intents his servants, and through them the possession of the ship is in him. Or it may be that the charterer only acquires by the charter the right to have his goods conveyed by a particular vessel, and, as subsidiary thereto, to have the use of the vessel and the services of the owner's master and crew." In the latter case "the ownership and also the possession of the ship remain in the original owner,

[1] *Hyman* v. *Nye* (1881) 6 Q. B. D. 685.

[2] *Per* Mathew, J., *ibid.*, at p. 690. As suggested above, p. 121, note (2), it may not be easy in practice to prove a breach of this duty against the owner of an aircraft who can show that he has complied with the many governmental requirements as to airworthiness and fitness for flight.

through the master and crew, who continue to be his servants." [1]

The present tendency is, it is understood, for agreements for the hiring or chartering of aircraft to take the first of these two forms, that is to say, a demise, special provisions as to personnel being incorporated if the charterer does not operate the aircraft by means of his own personnel. It is desirable to repeat here what has been said in an earlier chapter,[2] namely, that a party who puts forward a document containing provisions for his protection must use unambiguous language and that, in particular, any attempt to protect himself from the consequences of the negligence of himself and his servants will be severely scrutinized from the point of view of clarity. These principles apply to shipowners as regards charterparties and bills of lading, and there is no reason why they should not apply to the owners of aircraft.

§ 68. *Air Navigation Act*, 1920.—It remains to notice the effect of a charter upon the statutory responsibility of the owner and the charterer of an aircraft. The disabling part of section 9 (1) of the Act of 1920 which we have already discussed protects the charterer to the same extent as the owner against actions for trespass and nuisance. The enabling part creates a right of action to recover material damage or loss from the owner, but there are two cases in which the charterer may be involved. (i) Section 9 (1) contains a proviso to the effect that " where any damages recovered from or paid by the owner under this section arose from damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment," for instance, a charterer, the owner can recover the damages from him and may join him as a defendant in any such proceedings against the owner.

Further (ii), under section 9 (2), when material damage

[1] Scrutton, pp. 4, 5. For the chief legal results of construing the charter of a ship as a demise, see Scrutton, at pp. 5–9, and note the effect upon the right to claim a reward for salvage services.

[2] *Supra*, pp. 117–121.

is caused within the scope of section 9 by or from an aircraft which " has been bona fide demised, let, or hired out for a period exceeding fourteen days [1] to any other person by the owner thereof, and no pilot, commander, navigator or operative member of the crew of the aircraft is in the employment of the owner "—that is, in the case of an " out-and-out " charter of the bare aircraft without the services of a crew, section 9 operates as if charterer were substituted for owner; the charterer is directly and primarily liable, and the owner is protected. Where the conditions of section 9 (2) are not satisfied, the owner is primarily liable and may have a right of indemnity against (amongst others) a charterer under the proviso in section 9 (1) discussed above.

Similarly, section 10 of the Act of 1920, which defines and fixes penalties for dangerous flying, includes in its aim " any person by whom the aircraft is hired at the time of the offence."

Apart from statute, it is submitted that a claim against the owner of an aircraft arising out of damage done by it, for instance, by collision with another aircraft, must be based upon the negligence either of the owner or of his servants or others for whom he may be responsible.[2] Mere ownership cannot give rise to a liability at common law, and no proceedings *in rem* are available against the aircraft as would lie in Admiralty against a ship.[3] The provisions of section 9 (2) of the Act discussed above seem to reproduce closely the position of a shipowner whose ship is the cause of damage while under a charter amounting to a demise; in such a case the master and crew become the charterer's servants and the shipowner is not responsible for their acts.

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[1] The " fourteen days " appears to apply to demising, letting, and hiring alike.

[2] As in the case of a ship. See Marsden, p. 75: " The liability for damage by a ship does not attach to her owner *qua* owner. It is only as master or employer of the persons whose negligent act caused the damage that he incurs any liability "; and *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. at p. 751. See also above, pp. 64, 65.

[3] It is unnecessary to enter into the controversial question whether or not an innocent shipowner can be made liable by proceedings against his ship for damage done by the ship: see Marsden, pp. 81 *et seq.*

# CHAPTER 10

## AIRCRAFT INSURANCE

§ 69. The rapid progress of aviation has of course brought about a corresponding development in the insurance market.[1] Progress in aircraft insurance is essential to the progress of civil aviation.[2]

There are certain general principles [3] governing the contract of insurance which may be assumed to be applicable to aircraft insurance, for instance, the duty of disclosure incumbent upon both parties, the rule that insurance is *primâ facie* a contract of indemnity (which, however, does not apply to life policies or to "valued" policies), and the doctrine of subrogation. In course of time aircraft insurance will no doubt develop some characteristics peculiar to itself, and it is worth while devoting a short space to an examination of a typical policy of insurance against loss of, or damage to, the aircraft itself.

§ 70. In the standard form of Aircraft Policy issued by the British Aviation Insurance Company, the company agrees to indemnify the insured person (who is not necessarily the owner of the aircraft) against loss, not exceeding certain maximum amounts, falling within the terms of any or all of the six sections. These sections may be summarized as follows :

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[1] For a description of the facilities afforded by the London insurance market, see an interesting article in *The Times* Insurance Supplement of May 27, 1930, by Captain A. G. Lamplugh, the underwriter of the British Aviation Insurance Company, Limited.

[2] Upon aircraft insurance in the United States of America, see Hotchkiss, ch. vi., and Zollmann, *Law of the Air*, ch. iv. For an examination of aircraft insurance generally, comprising technical, legal, and commercial aspects, see Blum, *Les assurances aériennes* (Paris, 1930).

[3] See *Castellain* v. *Preston* (1883) 11 Q. B. D. 380.

Section A, *Accidental Damage*. (1) Flight and Taxi-ing Risks ; (2) Ground Risks, with certain exceptions.

Section B, *Fire*, in flight, when taxi-ing, and when on the ground.

Section C, *Theft*, except by any servant or agent or person under the control of the insured.

Section D, *Third Party*, which includes the liability of the insured person to others under section 9 of the Air Navigation Act, 1920, but excepts his liability (*inter alia*) for injury, damage or loss caused to or sustained by passengers, members of the household or family of the insured person and his subcontractors and their servants and agents.

Section E, *Legal Liability to Passengers*, in respect of bodily injury sustained whilst being carried in the aircraft or mounting into or dismounting therefrom, and in respect of damage to or loss of their property. But this liability is subject to a condition requiring that " every passenger carried for hire or reward or in an Aircraft plying for hire or reward " shall be carried only on the terms of a ticket which disclaims liability for personal injury, loss or damage however caused. Further, there is excepted from the scope of this section injury, loss or damage caused to or sustained by members of the family or household of the insured person or by his agents or servants or his subcontractors or their agents or servants.[1]

Then follow certain " General Exclusions " applicable to all sections of the policy, which limit the company's liability by excluding injury, loss or damage occurring in certain events or due to or arising out of or directly or indirectly connected with certain things, for instance, " stunting," or flying at night, or war.

Then follows a warranty of great importance :

> " Warranted that all air navigation and air-worthiness orders and requirements issued by any competent authority shall be

[1] Under Section E, is it clear that the company would be liable to indemnify the insured person in respect of his liability under the Fatal Accidents Acts to the dependants of a passenger who was killed by the wrongful act, neglect, or default of the insured person or of some person for whom he is responsible ? Does bodily injury include death ?

complied with in every respect, and that the aircraft shall be airworthy at the commencement of each flight."

The policy also contains clauses relating to value, reinstatement, and the basis of repairs, a series of five Special Provisos, a series of eleven Conditions, one of which stipulates that " this Policy shall be construed and governed by the laws of England," a list of Definitions, a Schedule of Aircraft Insured, and a Schedule of Covers, specifying the amounts insured under each Section and the premium.

§ 71. A few words may be said upon three expressions used in this policy: warranty, exception, exclusion. There seems to be no reason to doubt that a breach of the warranty quoted above would have the same effect as a breach of a warranty in any other contract of insurance, namely, that from the time of the breach the whole insurance is avoided, even though any loss or damage occurring may have no connection with the breach of warranty.

On the other hand, the effect of an exception or an exclusion differs *in toto* from that of a warranty. Exceptions and exclusions impose limitations—as to time, place, cause of loss or damage, nature of loss or damage, etc.—upon the general risks insured against, and loss or damage arising in the circumstances thus excepted or excluded is irrecoverable under the policy. But the doing of an excepted or excluded act or the occurrence of an excepted or excluded state of affairs does not avoid the policy as a breach of warranty does.[1]

The British Aviation Insurance Company also issues Cargo and Personal Accident Policies, but the forms of these policies are at present undergoing revision.

§ 72. There has so far been remarkably little litigation in British courts upon aviation insurance, but it is perhaps worth while drawing attention to a few of the decisions which have been given. It is common in insurance policies to exclude the first flight of the aircraft. A case

[1] Macgillivray, *Insurance Law* (1912), p. 274.

in which such an exclusion (occurring in a proposal form) was overridden by a special arrangement will be found in *Dunn and Tarrant* v. *Campbell and others*[1] in 1920, a decision which also illustrates the rule that ambiguous clauses in policies of insurance are to be construed *contra proferentes*, that is, usually, against the insurance company or underwriter.

It is important to determine the precise moment at which a policy of insurance attaches. A Personal Accident Policy usually attaches in the case of a passenger from the time of his " entering the aircraft preparatory to flight," together with an extension (akin to the Warehouse to Warehouse clause) of a journey, not exceeding 15 miles, to the aerodrome of departure. In the case of the pilot it is sometimes provided that the policy shall attach as soon as the aircraft is " in flight," and that " flight " shall be " deemed to commence from the time the aircraft moves forward in taking off for the actual air transit and shall be deemed to end on the aircraft coming to rest after contact with the ground or water " ; the definition in the case of an airship is different. Accordingly, it is clear that from the moment when an aircraft is taxi-ing with a view to taking off for flight, she is " in flight " within the meaning of such a policy and also in a general commercial sense. This point was discussed in the case of *Dunn and Tarrant* v. *Campbell and others*,[2] and the distinction there made will be noticed between a taxi-ing test with no immediate intention of flight and a taxi-ing preparatory to getting into the air.

The word " racing " commonly occurs amongst the General Exclusions contained in Aircraft and Personal Accident Policies. Its meaning was considered in *Alliance Aeroplane Company, Limited* v. *Union Insurance Society of Canton, Limited*,[3] where a claim was made in respect of the loss of an aircraft which started from Hounslow upon a flight for Australia and crashed within twenty minutes. It was engaged in a contest for a prize of £10,000 to be awarded to the first person that reached

[1] 2 Lloyd's List Law Reports 98 ; 4 *ibid.*, 36.
[2] 2 *ibid.*, at p. 101.
[3] (1920) 5 *ibid.*, pp. 341, 406.

a certain place in Australia by air. There was no question of the contemporaneous flight of a number of competitors, and no suggestion that the aircraft was flying at a racing speed; yet Bray, J., held that it was, at the time of the loss, "racing."

In the same case it was held that the expression "usual trial flights of the machine" did not cover a flight to Australia.

It is also worth noting in passing, though the construction of a particular document can only be used in a later case subject to great reserve, that the expression occurring in an insurance "slip" [1]—"Dunn is insured during 12 hours' flying in a Tarrant machine not exceeding three months from the date and time of the first flight"—was construed to mean from the beginning, and not the end, of the first flight.

Most companies to-day include in their life insurance policies, without any increase in premium, liberty to fly as a fare-paying passenger, but require an extra premium from persons flying in other circumstances. Accident policies commonly exclude, together with duelling, suicide, or participation in civil commotions, etc., death or injury sustained by the assured while taking part in "ballooning and/or any other form of aerial flight or attempt thereat." [2] The well-known "Householder's Comprehensive Policy," insuring the contents of a private dwelling-house, includes among the risks insured against damage caused by "aircraft and/or articles dropped therefrom."

The widespread availability of facilities for insurance against all kinds of risks connected with aviation is undoubtedly responsible for one of the main difficulties which confronts any one who seeks to state the English law relating to aviation, namely, the dearth of judicial

[1] 2 Lloyd's List Law Reports, at p. 101.

[2] A number of American decisions have been given upon the construction of expressions occurring in policies of assurance, such as "participating in aeronautics," "aeronautic activity," "engaged in aeronautics," etc.: *Meredith* v. *Business Men's Accident Association* (1923) 213 Mo. App. 688; *Pittman et al.* v. *Lamar Life Insurance Co.* (1927) 17 F. (2d.) 370; *Gits* v. *New York Life Insurance Co.* (1929) 32 F. (2d.) 7; *Masonic Accident Insurance Co.* v. *Jackson* (1929) 164 N. E. 628; *Peters* v. *Prudential Insurance Co.* (1929) 233 N. Y. S. 500. These, and some other insurance cases, will be found in Zollmann, *Cases*.

decisions upon liability for loss or damage occurring as the result of aviation. The policies nearly always provide for arbitration, and, when both the party sustaining loss or damage and the party alleged to be responsible for it are insured, it constantly happens that the claim will be settled without even a reference to arbitration, much less a court of law.

# CHAPTER 11

## MISCELLANEOUS AND TECHNICAL

§ 73. As this book is intended not so much for the aviator and the air transport company as for their legal advisers, we propose to say very little concerning the many technical regulations which must be observed. These regulations change from time to time, and it has been decided not to print them in the Appendices. They are easily obtainable from His Majesty's Stationery Office. The object of this short chapter is, therefore, not to tell the would-be pilot what the conditions of his eyes and his general health must be before he can obtain a licence, nor the aerodrome proprietor how to light his aerodrome at night correctly, nor the spectator how to distinguish by its marks a Bolivian aeroplane from a Bulgarian one. But it is proposed to state in general terms what different kinds of regulations there are which must be complied with by persons engaged in or connected with aviation, whether as an industry or as a means of private pleasure or locomotion.

These regulations (to use an omnibus term) fall into the following categories :

(1) The Convention of 1919 [1] (which is printed in Appendix A as amended by a series of Protocols already in force) contains 43 articles, the more important of which have been summarized in Chapter 1 above.

(2) Eight Annexes appended to this Convention and dealing with the following matters :

Annex A, *The Marking of Aircraft*, which prescribes the nature and location of the markings appropriate to each nationality, the form of the certificate of registration, and the appropriate call signs.

[1] A convenient text of the Convention, in English, French and Italian, with the 8 Annexes, is published by the International Commission for Air Navigation, whose address is 15 bis, Rue Georges-Bizet, Paris.

Annex B, *Certificates of Airworthiness*, which refers to certain minimum requirements of airworthiness and empowers the International Commission for Air Navigation to fix them.

Annex C, *Log Books*, which prescribes the contents of the Journey Log, the Aircraft Log, the Engine Log, and the Signal Log.

Annex D, *Rules as to Lights and Signals : Rules for Air Traffic*, which contains 52 sections regulating in great detail the nature and position of the lights to be carried by aircraft at night, both in the air and on the water, the signals to be made in different circumstances, and the rules to be observed by air traffic in meeting, crossing and overtaking, and in the vicinity of public aerodromes.

Annex E, *Minimum Qualifications Necessary for Obtaining Certificates and Licences as Pilots and Navigators*, specifying practical tests, technical examinations (in certain cases), medical examination, and certificates, etc.

Annex F, *International Aeronautical Maps and Ground Markings*.

Annex G, *Collection and Dissemination of Meteorological Information*, including weather forecasts, exchange of information, exhibition of current information at aerodromes, and meteorological organization of international airways.

Annex H, *Customs*, requiring aircraft going abroad to depart only from Customs aerodromes, and those arriving from abroad to land only at these aerodromes, and applying the normal Customs code to aircraft with certain necessary modifications.

(3) The Air Navigation (Consolidation) Order, 1923,[1] which came into operation on January 1, 1924, and has been amended many times.[2] This Order in Council, usually known as the "Consolidated Order," contains at present thirty-six articles and nine schedules. Its

[1] S. R. & O., 1923, No. 1508.

[2] By the following: S. R. & O., 1925, No. 1260; 1927, No. 263; 1928, No. 36; 1928, No. 588; 1928, No. 591; 1928, No. 900; 1929, No. 984; 1929, No. 1001; 1930, No. 334; 1931, No. 84; 1931, No. 85; 1931, No. 419.

main function is to give detailed effect to the Convention of 1919 and the Act of 1920. The following is a very brief description of the main provisions of the Order and its Schedules. The Order applies, as we have already seen,[1] to " all British aircraft registered in Great Britain and Northern Ireland wherever such aircraft may be " and " to other British aircraft and foreign aircraft when such aircraft are in or over Great Britain and Northern Ireland . . . " (article 2). It specifies certain general and special conditions which must be complied with before flying (articles 3 to 6 inclusive), and certain " general safety provisions " (article 9) directed against low flying, trick flying, smoking in aircraft, etc. Articles 15 to 17 inclusive require certain documents to be carried by aircraft ; article 14A relates to the compulsory carriage of wireless telegraphy apparatus in certain conditions, and article 18 prohibits the carriage of " explosives of war, arms of war, or munitions of war." Article 19 deals with aerial lighthouses, and article 20 with misleading lights. Article 22 empowers the Secretary of State to prescribe aerial corridors for the arrival and departure of aircraft in and from this country. Article 27 prescribes the penalties for contravention of the Order, and article 28 empowers the Secretary of State to cancel, suspend or endorse licences and certificates.

Of the nine Schedules to the Order, numbers one to five substantially enact Annexes A, B, C, D, and E of the Convention of 1919 ; Schedule VI relates to Fees, and Schedule VII to Prohibited Areas. Schedules VIII and IX deal with Customs and embody Annex H of the Convention.

(4) *The Air Navigation Directions*, 1930 and 1931 (A.N.D. 10, 10A, and 10B), which are issued by the Secretary of State for Air under article 30 of the Consolidated Order. They relate to the registration of aircraft, certificates of airworthiness (including those relating to " type aircraft," that is, the first aircraft constructed in accordance with a design of a new type), the classification of aircraft into (A) Flying Machines, and (B) Airships

[1] See above, p. 71.

and Balloons, the licensing and duties of ground engineers, the inspection and certification of aircraft before flight, instruments and equipment, wireless apparatus, log-books, licensing of personnel, licensed aerodromes, and the dropping of articles from aircraft, etc.

(5) Mention should also be made of the *Airworthiness Handbook for Civil Aircraft* (Air Publication 1208), published by the Air Ministry in loose-leaf form and continuously being amended by leaflets subsequently published by the Ministry. It is " intended to indicate the detailed requirements to be fulfilled by a type aircraft in order to qualify for a Certificate of Airworthiness."

## INVESTIGATION OF ACCIDENTS

§ 74. There is one further matter which requires to be mentioned. In the case of a novel and rapidly developing means of transport such as flying, it is clearly of the utmost importance—from the point of view both of ensuring compliance with existing regulations and of learning something by experience—that there should be an official inquiry into the causes of an accident. Accordingly, in pursuance of section 12 of the Act of 1920 there have been issued the Air Navigation (Investigation of Accidents) Regulations, dated June 28, 1922.[1]

*Scope.*—These Regulations apply to " accidents arising out of or in the course of air navigation which occur in or over the British Islands, or which occur elsewhere to British aircraft registered in the British Islands."

*Notification.*—When such an accident (i) " involves death or personal injury to any person, whether carried in the aircraft or not," or (ii) " serious structural damage to the aircraft," or (iii) " is believed on reasonable grounds to have been caused or contributed to by the failure in the air of any part of the aircraft," immediate notification must be made to the Air Ministry and, in the case of accidents occurring in or over the British Islands, to the local police.

When an accident has occurred an Inspector of

[1] S. R. & O., 1922, No. 650, as amended by 1925, No. 1099, and 1930, No. 840.

Accidents holds a *Preliminary Investigation* and reports to the Air Ministry. Whether or not a Preliminary Investigation has been held, the Air Ministry may direct a *Formal Investigation* to be held and appoint a competent person (called "the Court") to hold it, assisted by one or more persons possessing "legal, aeronautical, engineering, or other special knowledge." The Court has all the powers of a court of summary jurisdiction and all the powers of an inspector under the Railway Regulation Acts, 1840 to 1889, and may inspect premises, require the attendance of witnesses, and administer oaths. The Court reports to the Air Ministry its findings as to the causes and circumstances of the accident, adding any recommendations with a view to the preservation of life and the avoidance of similar accidents in the future and as to the cancellation, suspension, or endorsement of any licence or certificate. In the case of both a *Preliminary* and a *Formal Investigation* [1] any person against whom a charge is made or is likely to be made must have the opportunity of being present and of making a statement or of giving evidence and producing witnesses.

These investigations in no way take the place of or interfere with the holding of a Coroner's Inquest upon the cause of a death.

[1] "Formal Investigations" were held upon the occasions of the disasters which occurred to air liners at Croydon on December 24, 1924, and in the English Channel on June 17, 1929, and in the case of the loss of the R 101 on October 5, 1930.

# APPENDIX A

## CONVENTION

### RELATING TO THE REGULATION OF AERIAL NAVIGATION DATED 13TH OCTOBER, 1919

Corrected text, as published by the International Commission for Air Navigation and brought up to date [1]

### CHAPTER I

#### GENERAL PRINCIPLES

ART. 1.—The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto.

ART. 2.—Each contracting State undertakes in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States, provided that the conditions laid down in the present Convention are observed.

Regulations made by a contracting State as to the admission over its territory of the aircraft of the other contracting States shall be applied without distinction of nationality.

ART. 3.—Each contracting State is entitled for military reasons or in the interest of public safety to prohibit the aircraft of the other contracting States, under the penalties *provided* by its legislation and subject to no distinction being made in this respect between its private aircraft and those of the other contracting States, from flying over certain areas of its territory.

In that case the locality and the extent of the prohibited areas shall be published and notified beforehand to the other contracting States.

[1] Only a few of the footnotes contained in the official edition of the Convention are reproduced here.

ART. 4.—Every aircraft which finds itself above a prohibited area shall, as soon as aware of the fact, give the signal of distress provided in paragraph 17 of Annex D and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over.

## CHAPTER II

### NATIONALITY OF AIRCRAFT

ART. 5.—No contracting State shall, except by a special and temporary authorization, permit the flight above its territory of an aircraft which does not possess the nationality of a contracting State *unless* [1] *it has concluded a special convention with the State in which the aircraft is registered. The stipulations of such special convention must not infringe the rights of the contracting Parties to the present Convention and must conform to the rules laid down by the said Convention and its Annexes. Such special convention shall be communicated to the International Commission for Air Navigation which will bring it to the knowledge of the other contracting States.*

ART. 6.—Aircraft possess the nationality of the State on the register of which they are entered, in accordance with the provisions of Section I (*c*) of Annex A.

ART. 7.—No aircraft shall be entered on the register of one of the contracting States unless it belongs wholly to nationals of such State.

No incorporated company can be registered as the owner of an aircraft unless it possess the nationality of the State in which the aircraft is registered, unless the President or Chairman of the company and at least two-thirds of the directors possess such nationality, and unless the company fulfils all other conditions which may be prescribed by the laws of the said State.

ART. 8.—An aircraft cannot be validly registered in more than one State.

ART. 9.—The contracting States shall exchange every month among themselves and transmit to the International Commission for Air Navigation referred to in Article 34 copies of registrations and of cancellations of registrations which shall have been entered on their official registers during the preceding month.

[1] This Article was modified to read as above by a Protocol dated in London, October 27, 1922, which entered into force on December 14, 1926.

ART. 10.—All aircraft engaged in international navigation shall bear their nationality and registration marks as well as the name and residence of the owner in accordance with Annex A.

## CHAPTER III

### CERTIFICATES OF AIRWORTHINESS AND COMPETENCY

ART. 11.—Every aircraft engaged in international navigation shall, in accordance with the conditions laid down in Annex B, be provided with a certificate of airworthiness issued or rendered valid by the State whose nationality it possesses.

ART. 12.—The commanding officer, pilots, engineers and other members of the operating crew of every aircraft shall, in accordance with the conditions laid down in Annex E, be provided with certificates of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses.

ART. 13.—Certificates of airworthiness and of competency and licences issued or rendered valid by the State whose nationality the aircraft possesses, in accordance with the regulations established by Annex B and Annex E and hereafter by the International Commission for Air Navigation, shall be recognized as valid by the other States.

Each State has the right to refuse to recognize for the purpose of flights within the limits of and above its own territory certificates of competency and licences granted to one of its nationals by another contracting State.

ART. 14.—No wireless apparatus shall be carried without a special licence issued by the State whose nationality the aircraft possesses. Such apparatus shall not be used except by members of the crew provided with a special licence for the *purpose*.

Every aircraft used in public transport and capable of carrying ten or more persons shall be equipped with sending and receiving wireless apparatus when the methods of employing such apparatus shall have been determined by the International Commission for Air Navigation.

This Commission may later extend the obligation of carrying wireless apparatus to all other classes of aircraft in the conditions and according to the methods which it may determine.

## CHAPTER IV

### ADMISSION TO AIR NAVIGATION ABOVE FOREIGN TERRITORY

ART. 15.—Every aircraft of a contracting State has the right to cross the air space of another State without landing. In this case it shall follow the route fixed by the State over which the flight takes place. However, for reasons of general security it will be obliged to land if ordered to do so by means of the signals provided in Annex D.

Every aircraft which passes from one State into another shall, if the regulations of the latter State require it, land in one of the aerodromes fixed by the latter. Notification of these aerodromes shall be given by the contracting States to the International Commission for Air Navigation and by it transmitted to all the contracting States.

The establishment of international airways shall be subject to the consent of the States flown over.

ART. 16.—Each contracting State shall have the right to establish reservations and restrictions in favour of its *national* aircraft in connection with the carriage of persons and goods for hire between two points on its territory.

Such reservations and restrictions shall be immediately published, and shall be communicated to the International Commission for Air Navigation, which shall notify them to the other contracting States.

ART. 17.—The aircraft of a contracting State which establishes reservations and restrictions in accordance with Article 16, may be subjected to the same reservations and restrictions in any other contracting State, even though the latter State does not itself impose the reservations and restrictions on other foreign aircraft.

ART. 18.—Every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purpose of such transit, shall be exempt from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security the amount of which in default of amicable agreement shall be fixed with the least possible delay by the competent authority of the place of seizure.

## CHAPTER V

### RULES TO BE OBSERVED ON DEPARTURE WHEN UNDER WAY AND ON LANDING

ART. 19.—Every aircraft engaged in international navigation shall be provided with :

(*a*) A certificate of registration in accordance with Annex A ;
(*b*) A certificate of airworthiness in accordance with Annex B ;
(*c*) Certificates and licences of the commanding officer, pilots, and crew in accordance with Annex E ;
(*d*) If it carries passengers, a list of their names ;
(*e*) If it carries freight, bills of lading and manifest ;
(*f*) Log books in accordance with Annex C ;
(*g*) If equipped with wireless, the special licence prescribed by Article 14.

ART. 20.—The log-books shall be kept for two years after the last entry.

ART. 21.—Upon the departure or landing of an aircraft, the authorities of the country shall have, in all cases, the right to visit the aircraft and to verify all the documents with which it must be provided.

ART. 22.—Aircraft of the contracting States shall be *entitled* to the same measures of assistance for landing, particularly in case of distress, as national aircraft.

ART. 23.—With regard to the salvage of aircraft wrecked at sea the principles of maritime law will apply, in the absence of any agreement to the contrary.

ART. 24.—Every aerodrome in a contracting State, which upon payment of charges is open to public use by its national aircraft, shall likewise be open to the aircraft of all the other contracting States.

In every such aerodrome there shall be a single tariff of charges for landing and length of stay applicable alike to national and foreign aircraft.

ART. 25.—Each contracting State undertakes to adopt measures to ensure that every aircraft flying above the limits of *its* territory and that every aircraft wherever it may be, carrying its nationality mark, shall comply with the regulations contained in Annex D.

Each of the contracting States undertakes to ensure the prosecution and punishment of all persons contravening these regulations.

## CHAPTER VI

### PROHIBITED TRANSPORT

ART. 26.—The carriage by aircraft of explosives and of arms and munitions of war is forbidden in international navigation. No foreign aircraft shall be permitted to carry such articles between any two points in the same contracting State.

ART. 27.—Each State may, in aerial navigation, prohibit or regulate the carriage or use of photographic apparatus. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.

ART. 28.—As a measure of public safety, the carriage of objects other than those mentioned in Articles 26 and 27 may be subjected to restrictions by any contracting State. Any such regulations shall be at once notified to the International Commission for Air Navigation, which shall communicate this information to the other contracting States.

ART. 29.—All restrictions mentioned in Article 28 shall be applied equally to national and foreign aircraft.

## CHAPTER VII

### STATE AIRCRAFT

ART. 30.—The following shall be deemed to be State aircraft :

(*a*) Military aircraft.

(*b*) Aircraft exclusively employed in State service, such as posts, customs, police.

Every other aircraft shall be deemed to be a private aircraft.

All State aircraft other than military, customs, and police aircraft shall be treated as private aircraft and as such shall be subject to all the provisions of the present Convention.

ART. 31.—Every aircraft commanded by a person in military service detailed for the purpose shall be deemed to be a military aircraft.

ART. 32.—No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization. In case of such *authorization* the military aircraft shall enjoy, in principle, in the absence of

special stipulation the privileges which are customarily accorded to foreign ships of war.

A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.

ART. 33.—Special arrangements between the States concerned will determine in what cases police and customs aircraft may be authorized to cross the frontier. They shall in no case be entitled to the privileges referred to in Article 32.

## CHAPTER VIII

### INTERNATIONAL COMMISSION FOR AIR NAVIGATION

ART. 34.—There shall be instituted, under the name of the International Commission for Air Navigation, a permanent Commission placed under the direction of the League of Nations and composed of:

Two Representatives of each of the following States: The United States of America, France, Italy, and Japan;

One Representative of Great Britain and one of each of the British Dominions and of India;

One Representative of each of the other contracting States.

*Each State represented on the Commission* (Great Britain, the British Dominions, and India counting for this purpose as one State) *shall have one vote.*[1]

The International Commission for Air Navigation shall determine the rules of its own procedure and the place of its permanent seat, but it shall be free to meet in such places as it may deem convenient. Its first meeting shall take place at Paris. This meeting shall be convened by the French Government, as soon as a majority of the signatory States shall have notified to it their ratification of the present Convention.

The duties of this Commission shall be:

(*a*) To receive proposals from or to make proposals to any of the contracting States for the modification or amendment of the provisions of the present Convention, and to notify changes adopted;

(*b*) To carry out the duties imposed upon it by the present Article and by Articles 9, 13, 14, 15, *16*, 27, 28, 36, and 37 of the present Convention;

[1] This Article was modified to read as above by a Protocol dated in London June 30, 1923, which entered into force on December 14, 1926.

(*c*) To amend the provisions of the Annexes A–G ;

(*d*) To collect and communicate to the contracting States information of every kind concerning international air navigation ;

(*e*) To collect and communicate to the contracting States all information relating to wireless telegraphy, meteorology, and medical science which may be of interest to air navigation ;

(*f*) To ensure the publication of maps for air navigation in accordance with the provisions of Annex F ;

(*g*) To give its opinion on questions which the States may submit for examination.

Any modification of the provisions of any one of the Annexes may be made by the International Commission for Air Navigation when such modification shall have been approved by three-fourths of the total possible votes which could be cast if all the States were represented : *this majority must, moreover, include at least three of the five following States : The United States of America, the British Empire, France, Italy, and Japan.*[1] *Such modification* shall become effective from the time when it shall have been notified by the International Commission for Air Navigation to all the contracting States.

Any proposed modification of the Articles of the present Convention shall be examined by the International Commission for Air Navigation, whether it originates with one of the contracting States or with the Commission itself. No such modification shall be proposed for adoption by the contracting States, unless it shall have been approved by at least two-thirds of the total possible votes.

All such modifications of the Articles of the Convention (but not of the provisions of the Annexes) must be formally adopted by the contracting States before they become effective.

The expenses of organization and operation of the International Commission for Air Navigation shall be borne by the contracting States ; *the total shall be allocated in the proportion of two shares each for the United States of America, the British Empire, France, Italy, and Japan, and one share each for all the other States.*[2]

The expenses occasioned by the sending of technical delegations will be borne by their respective States.

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[1] See note to para. 5, *ante*, of Article 34.

[2] *Ibid.*

## CHAPTER IX

### FINAL PROVISIONS

ART. 35.—The High Contracting Parties undertake as far as they are respectively concerned to co-operate as far as possible in international measures concerning :

(*a*) The collection and dissemination of statistical, current, and special meteorological information, in accordance with the provisions of Annex G ;

(*b*) The publication of standard aeronautical maps, and the establishment of a uniform system of ground marks for flying, in accordance with the provisions of Annex F ;

(*c*) The use of wireless telegraphy in air navigation, the establishment of the necessary wireless stations, and the observance of international wireless regulations.

ART. 36.—General provisions relative to customs in connection with international air navigation are the subject of a special agreement contained in Annex H to the present Convention.

Nothing in the present Convention shall be construed as preventing the contracting States from concluding, in conformity with its principles, special protocols as between State and State in respect of customs, police, posts, and other matters *of* common interest in connection with air navigation. Any such protocols shall be at once notified to the International Commission for Air Navigation which shall communicate this information to the other contracting States.

ART. 37.—In the case of a disagreement between two or more States relating to the interpretation of the present Convention, the question in dispute shall be determined by the Permanent Court of International Justice to be established by the League of Nations, and until its establishment by arbitration.

If the parties do not agree on the choice of the arbitrators, they shall proceed as follows :

Each of the parties shall name an arbitrator, and the arbitrators shall meet to name an umpire. If the arbitrators cannot agree, the parties shall each name a third State, and the third States so named shall proceed to designate the umpire, by agreement or by each proposing a name and then determining the choice by lot.

Disagreement relating to the technical regulations annexed to the present Convention shall be settled by the decision of the International Commission for Air Navigation by a majority of votes.

In case the difference involves the question whether the interpretation of the Convention or that of a regulation is concerned, final decision shall be made by arbitration as provided in the first paragraph of this Article.

ART. 38.—In case of war, the provisions of the present Convention shall not affect the freedom of action of the contracting States either as belligerents or as neutrals.

ART. 39.—The provisions of the present Convention are completed by the Annexes A to H which, subject to Article 34 (*c*), shall have the same effect and shall come into force at the same time as the Convention itself.

ART. 40.—The British Dominions and India shall be deemed to be States for the purposes of the present Convention.

The territories and nationals of Protectorates or of territories administered in the name of the League of Nations shall, for the purposes of the present Convention, be assimilated to the territory and nationals of the Protecting or Mandatory States.

ART. 41.—States which have not taken part in the war of 1914–1919 shall be permitted to adhere to the present Convention.

This adhesion shall be notified through the diplomatic channel to the Government of the French Republic, and by it to all the signatory or adhering States.

ART. 42.—A State which took part in the war of 1914–1919, but which is not a signatory of the present Convention, may adhere only if it is a member of the League of Nations or, until January 1, 1923, if its adhesion is approved by the Allied and Associated Powers signatories of the Treaty of Peace concluded with the said State. After January 1, 1923, this adhesion may be admitted if it is agreed to by at least three-fourths of the signatory and adhering States voting under the conditions provided by Article 34 of the present Convention.

Applications for adhesions shall be addressed to the Government of the French Republic, which will communicate them to the other contracting Powers. Unless the State applying is admitted *ipso facto* as a Member of the League of Nations, the French Government will receive the votes of the said Powers and will announce to them the result of the voting.

ART. 43.—The present Convention may not be denounced before January 1, 1922. In case of denunciation, notification thereof shall be made to the Government of the French Republic, which shall communicate it to the other contracting Parties. Such denunciation shall not take effect until at least one year

after the giving of notice, and shall take effect only with respect to the Power which has given notice.

THE PRESENT CONVENTION shall be ratified.

Each Power will address its ratification to the French Government, which will inform the other signatory Powers.

The ratifications will remain deposited in the archives of the French Government.

The present Convention will come into force for each signatory Power, in respect of other Powers which have already ratified, forty days from the date of the deposit of its ratification.

On the coming into force of the present Convention, the French Government will transmit a certified copy to the Powers which under the Treaties of Peace have undertaken to enforce rules of aerial navigation in conformity with those contained in it.

DONE at Paris, the thirteenth day of October nineteen hundred and nineteen in a single copy which shall remain deposited in the archives of the French Government, and of which duly authorized copies shall be sent to the contracting States.

The said copy, dated as above, may be signed until the twelfth day of April nineteen hundred and twenty inclusively.

In FAITH WHEREOF the hereinafter-named Plenipotentiaries whose powers have been found in good and due form have signed the present Convention in the French, English, and Italian languages, which are equally authentic.

## TITLES OF THE ANNEXES

(As amended up to date)

ANNEX A. The Marking of Aircraft and Call Signs.

ANNEX B. Certificates of Airworthiness.

ANNEX C. Log-books.

ANNEX D. Rules as to Lights and Signals. Rules for Air Traffic.

ANNEX E. Minimum Qualifications Necessary for Obtaining Certificates and Licences as Pilots and Navigators.

ANNEX F. International Aeronautical Maps and Ground Markings.

ANNEX G. Collection and Dissemination of Meteorological Information.

ANNEX H. Customs.

The Convention is now (March 31, 1932) in force between the following twenty-nine parties :

1. Australia.
2. Belgium.
3. Bulgaria.
4. Canada.
5. Chile.
6. Czecho-Slovakia.
7. Denmark.
8. Finland.
9. France.
10. Great Britain and Northern Ireland.
11. Greece.
12. Holland.
13. India.
14. Iraq.
15. Irish Free State.
16. Italy.
17. Japan.
18. New Zealand.
19. Norway.
20. Persia.
21. Poland.
22. Portugal.
23. Roumania.
24. Saar Territory.
25. Siam.
26. South Africa.
27. Sweden.
28. Uruguay.
29. Yugoslavia.

There are also two Protocols dated respectively June 15, 1929, and December 11, 1929, which modify certain of the Articles of the Convention of 1919, but which have not yet come into force (*see* Roper, pp. 374–379).

# APPENDIX B

## AIR NAVIGATION ACT, 1920

(10 & 11 Geo. 5, c. 80)

An Act to enable effect to be given to a Convention for regulating Air Navigation, and to make further provision for the control and regulation of aviation. [23rd December, 1920.]

WHEREAS the full and absolute sovereignty and rightful jurisdiction of His Majesty extends, and has always extended, over the air superincumbent on all parts of His Majesty's dominions and the territorial waters adjacent thereto :

And whereas a Convention (in this Act referred to as " the Convention ") for determining by a common agreement certain uniform rules with respect to international air navigation, was signed on behalf of His Majesty in Paris on the thirteenth day of October, nineteen hundred and nineteen, and has been presented to Parliament :

And whereas it is expedient to make further provision for controlling and regulating the navigation of aircraft, whether British or foreign, within the limits of His Majesty's jurisdiction as aforesaid, and, in the case of British aircraft, for regulating the navigation thereof both within such jurisdiction and elsewhere :

And whereas it is also expedient that provision should be made by Parliament for enabling effect to be given to the Convention :

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows :—

### PART I

### POWER TO APPLY CONVENTION

1. His Majesty may make such Orders in Council as appear to him necessary for carrying out the Convention and for giving

effect thereto or to any of the provisions thereof, or to any amendment which may be made under article thirty-four thereof.

2. His Majesty may, by Order in Council, direct that the provisions of the Convention for the time being in force, or any of them, and whether or not those provisions are limited to aircraft of any special description, or engaged in any special kind of navigation, shall apply to or in relation to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and may make such consequential and supplementary provisions as appear necessary or expedient for the purpose of such application.

3. Without prejudice to the generality of the powers hereinbefore conferred, an Order in Council under this Part of this Act may make provision—

(*a*) prescribing the authority by which any of the powers exerciseable under the Convention by a contracting State, or by any authority therein, are to be exercised in the British Islands ;

(*b*) for the licensing, inspection, and regulation of aerodromes, for access to aerodromes and places where aircraft have landed, for access to aircraft factories for the purpose of inspecting the work therein carried on, for prohibiting or regulating the use of unlicensed aerodromes, and for the licensing of personnel employed at aerodromes in the inspection or supervision of aircraft ;

(*c*) as to the manner and conditions of the issue and renewal of any certificate or licence required by the Order or by the Convention, including the examinations and tests to be undergone, and the form, custody, production, cancellation, suspension, endorsement and surrender of any such certificate or licence ;

(*d*) as to the keeping and form of the register of British aircraft ;

(*e*) as to the conditions under which aircraft may be used for carrying goods, mails and passengers ;

(*f*) as to the conditions under which aircraft may pass, or goods, mails or passengers may be conveyed by aircraft, into or from the British Islands, or from one British island to another ;

(*g*) exempting from the provisions of the Order or of the Convention, or any of them, aircraft flown for experimental purposes, or any other aircraft or persons where it appears unnecessary that the same should apply ;

(*h*) prescribing the scales of charges at licensed aerodromes ;

(*i*) prescribing, subject to the consent of the Treasury, the fees to be paid in respect of the grant of any certificate or licence or otherwise for the purposes of the Order or the Convention ;

(*j*) supplementing the Convention, in such manner as appears necessary or expedient, by general safety regulations ;

(*k*) for the control and regulation of aerial lighthouses, and lights at or in the neighbourhood of aerodromes and aerial lighthouses ;

(*l*) regulating the signals which may be made by aircraft and persons carried therein ; and

(*m*) for the imposition of penalties (not exceeding imprisonment for a term of six months and a fine of two hundred pounds) to secure compliance with the Order or the Convention, and for the mode of enforcing such penalties, and authorizing any steps to be taken for preventing aircraft from flying over prohibited areas or entering the British Islands in contravention of the Order or the Convention which were authorized to be taken under section two of the Aerial Navigation Act, 1913, for the purposes of that section.

4.—(1) His Majesty may, by Order in Council, extend, with any necessary modifications and exceptions, any of the provisions of this Act to any British possessions other than those mentioned in the Schedule to this Act, and to any territory under His Majesty's protection :

Provided that the expression " territory under His Majesty's protection " shall not include any territory over which the Government of any part of His Majesty's Dominions mentioned in the Schedule to this Act exercises authority.

(2) His Majesty may, by any such Order in Council extending any provisions of this Act as aforesaid, or by any subsequent Order, make any provisions of an Order in Council made under sections one to three of this Act applicable to any such possessions or territories as aforesaid, and to registered aircraft being the property of British subjects resident or companies incorporated therein, with such modifications and extensions as shall appear necessary.

5. Any sums required for the contribution from the United Kingdom for the organization and operations of the international commission for air navigation set up under the Convention, or occasioned by the sending of technical delegations, shall be paid by the Secretary of State out of moneys provided by Parliament.

## PART II

### GENERAL

6. The purposes of the Air Council, established under the Air Force (Constitution) Act, 1917, shall extend so as to include all matters connected with air navigation.

7.—(1) In time of war, whether actual or imminent, or of great national emergency, the Secretary of State may, by order, regulate or prohibit, either absolutely or subject to such conditions as may be contained in the order, and notwithstanding the provisions of this Act or any Order or regulations made thereunder, the navigation of all or any descriptions of aircraft over the British Islands or any portion thereof, or the territoral waters adjacent thereto ; and, without prejudice to the generality of this provision, any such order may provide for taking possession of and using for the purposes of His Majesty's naval, military or air forces any aerodrome or landing ground, or any aircraft, machinery, plant, material or things found therein or thereon, and for regulating or prohibiting the use, erection, building, maintenance or establishment of any aerodrome, flying school, or landing ground, or any class or description thereof.

(2) The order may provide for the imposition of penalties to secure compliance with the order, not exceeding those which may be imposed for contravention of an Order in Council under Part I of this Act, and may authorize such steps to be taken in order to secure such compliance as appear to the Secretary of State to be necessary.

(3) Any person who suffers direct injury or loss, owing to the operation of an order of the Secretary of State under this section, shall be entitled to receive compensation from the Secretary of State, the amount thereof to be fixed, in default of agreement, by an official arbitrator appointed under the Acquisition of Land (Assessment of Compensation) Act, 1919, the principles of that Act being applied, with the necessary modifications, where possession is taken of any land or premises :

Provided that no compensation shall be payable by reason of the operation of a general order under this section prohibiting flying in the British Islands or any part thereof.

(4) An order under this section may be revoked or varied by a subsequent order made by the Secretary of State.

8.—(1) The Air Council, and any local authority to which this section applies with the consent of the Air Council, and subject to such conditions as the Air Council may prescribe,

shall have power to establish and maintain aerodromes (including power to provide and maintain roads and approaches, buildings and other accommodation and apparatus and equipment for such aerodromes) and to acquire land for that purpose, by purchase or hire, in the case of a local authority by agreement, and in the case of the Air Council either by agreement or in accordance with the provisions of this Act as to the acquisition of land by the Air Council. Land may be acquired by a local authority under this section either within or without the area of the authority.

(2) A local authority providing an aerodrome under this section shall have power to carry on in connection therewith any subsidiary business certified by the Air Council to be ancillary to the carrying on of an aerodrome.

(3) The local authorities to which this section applies are the common council of the city of London, the councils of counties and county boroughs, and urban district councils, and the expenses of those councils under this section shall be defrayed, in the case of the common council of the city of London out of the general rate, in the case of a county council as expenses for general county purposes, and in the case of other councils as expenses incurred in the administration of the Public Health Acts, 1875 to 1908.

(4) A local authority may borrow for the purposes of this section, in the case of the common council of the city of London under the City of London Sewers Acts, 1848 to 1897, and in the case of a county council under section sixty-nine of the Local Government Act, 1888, as if those purposes were mentioned in that section, and in the case of the council of a county borough or urban district shall have the same power of borrowing under this section as they have under the Public Health Acts, 1875 to 1908, for the purpose of defraying any expenses incurred by them in the administration of those Acts, but money so borrowed shall not be reckoned as part of the debt of such local authority for the purposes of any enactment limiting the powers of borrowing by the authority.

(5) For the purpose of the purchase of land under this section by a local authority, the Lands Clauses Acts shall be incorporated with this Act except the provisions of those Acts with respect to the purchase and taking of land otherwise than by agreement.

9.—(1) No action shall lie in respect of trespass or in respect of nuisance, by reason only of the flight of aircraft over any property at a height above the ground, which, having regard to wind, weather, and all the circumstances of the case is reason-

able, or the ordinary incidents of such flight, so long as the provisions of this Act and any Order made thereunder and of the Convention are duly complied with; but where material damage or loss is caused by an aircraft in flight, taking off, or landing, or by any person in any such aircraft, or by any article falling from any such aircraft, to any person or property on land or water, damages shall be recoverable from the owner of the aircraft in respect of such damage or loss, without proof of negligence or intention or other cause of action, as though the same had been caused by his wilful act, neglect or default, except where the damage or loss was caused by or contributed to by the negligence of the person by whom the same was suffered:

Provided that, where any damages recovered from or paid by the owner of an aircraft under this section arose from damage or loss caused solely by the wrongful or negligent action or omission of any person other than the owner or some person in his employment, the owner shall be entitled to recover from that person the amount of such damages, and in any such proceedings against the owner the owner may, on making such application to the court and on giving such undertaking in costs as may be prescribed by rules of court, join any such person as aforesaid as a defendant, but where such person is not so joined he shall not in any subsequent proceedings taken against him by the owner be precluded from disputing the reasonableness of any damages recovered from or paid by the owner.

(2) Where any aircraft has been *bonâ fide* demised, let, or hired out for a period exceeding fourteen days to any other person by the owner thereof, and no pilot, commander, navigator, or operative member of the crew of the aircraft is in the employment of the owner, this section shall have effect as though for references to the owner there were substituted references to the person to whom the aircraft has been so demised, let, or hired out.

10.—(1) Where an aircraft is flown in such a manner as to be the cause of unnecessary danger to any person or property on land or water, the pilot or the person in charge of the aircraft, and also the owner thereof, unless he proves to the satisfaction of the court that the aircraft was so flown without his actual fault or privity, shall be liable on summary conviction to a fine not exceeding two hundred pounds, or to imprisonment with or without hard labour for a term not exceeding six months, or to both such imprisonment and fine.

For the purposes of this section, the expression " owner " in

relation to an aircraft includes any person by whom the aircraft is hired at the time of the offence.

(2) The provisions of this section shall be in addition to and not in derogation of any general safety or other regulations prescribed by Order in Council under Part I of this Act.

11. The law relating to wreck and to salvage of life or property, and to the duty of rendering assistance to vessels in distress (including the provisions of the Merchant Shipping Acts, 1894 to 1916, and any other Act relating to those subjects), shall apply to aircraft on or over the sea or tidal waters as it applies to vessels, and the owner of an aircraft shall be entitled to a reasonable reward for salvage services rendered by the aircraft to any property or persons in any case where the owner of a ship would be so entitled :

Provided that provision may be made by Order in Council for making modifications of and exemptions from the provisions of such law and Acts as aforesaid in their application to aircraft, to such extent and in such manner as appears necessary or expedient.

12.—(1) The Secretary of State may make regulations providing for the investigation of any accident arising out of or in the course of air navigation and occurring in or over the British Islands or the territorial waters adjacent thereto, or to British aircraft elsewhere.

(2) Without prejudice to the generality of the foregoing provision, regulations under this section may contain provisions—

(*a*) requiring notice to be given of any such accident as aforesaid in such manner and by such persons as may be specified in the order ;

(*b*) applying, with or without modification, for the purpose of investigations held with respect to any such accidents any of the provisions of section three of the Notice of Accidents Act, 1894 ;

(*c*) prohibiting, pending investigation, access to or interference with aircraft to which an accident has occurred, and authorizing any person, so far as may be necessary for the purposes of an investigation, to have access to, examine, remove, take measures for the preservation of, or otherwise deal with any such aircraft ;

(*d*) authorizing or requiring the cancellation, suspension, endorsement, or surrender of any licence or certificate granted under this Act or any order made thereunder, where it appears on an investigation that the licence

ought to be cancelled, suspended, endorsed, or surrendered, and for the production of any such licence for the purpose of being so dealt with :

Provided that nothing in the section shall limit the powers of any authority under sections five hundred and thirty to five hundred and thirty-seven inclusive of the Merchant Shipping Act, 1894, or any enactment (including this Act) amending those sections.

(3) If any person contravenes or fails to comply with any regulations under this section, he shall be liable on summary conviction to a fine not exceeding fifty pounds or to imprisonment with or without hard labour for a term not exceeding three months.

13.—(1) Where it is alleged by any person interested that a foreign aircraft making a passage through or over the British Islands infringes in itself or in any part of it any invention, design or model which is entitled to protection in the British Islands, it shall be lawful, subject to and in accordance with Rules of Court, to detain such aircraft until the owner thereof deposits or secures in respect of the alleged infringement a sum (in this section called the deposited sum), and thereupon the aircraft shall not, during the continuance or in the course of the passage, be subject to any lien, arrest, detention or prohibition, whether by order of a court or otherwise, in respect or on account of the alleged infringement.

(2) The deposited sum shall be such a sum as may be agreed between the parties interested, or in default of agreement shall be fixed by the Secretary of State or some person duly authorized on his behalf, and payment thereof shall be made or secured to him in such manner as he shall approve. The deposited sum shall be dealt with by such tribunal and in accordance with such procedure as may be prescribed by Rules of Court, and such rules may provide generally for carrying this section into effect.

(3) For the purposes of this section, the expression " owner " shall include the actual owner of an aircraft, and any person claiming through or under him, and the expression " passage " shall include all reasonable landings and stoppages in the course or the purpose of a passage.

14.—(1) Any offence under this Act or under an Order in Council or regulations made thereunder, and any offence whatever committed on a British aircraft, shall, for the purpose of conferring jurisdiction, be deemed to have been committed in any place where the offender may for the time being be.

(2) His Majesty may, by Order in Council, make provision as to the courts in which proceedings may be taken for enforcing any claim under this Act, or any other claim in respect of aircraft, and in particular may provide for conferring jurisdiction in any such proceedings on any court exercising Admiralty jurisdiction and applying to such proceedings any rules of practice or procedure applicable to proceedings in Admiralty.

(3) Section six hundred and ninety-two of the Merchant Shipping Act, 1894, shall, with the necessary modifications, and in particular with the substitution of the Air Council for the Board of Trade, apply to the detention of any aircraft under this Act or any orders or regulations made thereunder as it applies to the detention of a ship under that Act.

15. The power of a Secretary of State to acquire land under the Military Lands Acts, 1892 to 1903, shall include power to acquire land for the purposes of this Act and generally for the purposes of civil aviation, and those Acts shall have effect accordingly with the necessary modifications, and in particular as though references to a military purpose included references to any such purposes as aforesaid.

16. Any expenses incurred by a Secretary of State or the Air Council in the exercise of their powers under this Act, including the expenses of any investigation under this Act, shall be paid out of moneys provided by Parliament.

17.—(1) An Order in Council under this Act may be made applicable to any aircraft in or over the British Islands or the territorial waters adjacent thereto, and to British aircraft wherever they may be.

(2) An Order in Council under this Act may be revoked or varied by a subsequent Order in Council.

(3) Any Order in Council made under this Act shall be laid before each House of Parliament forthwith, and, if an Address is presented to His Majesty by either House of Parliament within the next subsequent twenty-one days on which that House has sat next after any such Order is laid before it praying that the Order or any provision thereof may be annulled, His Majesty in Council may annul the Order or provision, and it shall thenceforth be void, but without prejudice to the validity of anything previously done thereunder.

18.—(1) This Act shall not apply to aircraft belonging to or exclusively employed in the service of His Majesty:

Provided that His Majesty may, by Order in Council, apply to any such aircraft, with or without modification, any of the

provisions of this Act or of any orders or regulations made thereunder.

(2) Nothing in this Act, or in any orders or regulations thereunder, shall prejudice or affect the rights, powers, or privileges of any general or local lighthouse authority.

19.—(1) This Act shall apply to Scotland subject to the following modifications :—

Sub-sections (3) and (4) of the section of this Act relating to establishment of aerodromes by the Air Council and local authorities shall not apply, and in lieu thereof—

(*a*) the local authorities to which the said section shall apply shall be county councils and town councils, and the expenses of county councils under the said section shall be defrayed out of the general purposes rate, provided that notwithstanding anything in the Local Government (Scotland) Act, 1889, the ratepayers of any police burgh, which shall have established an aerodrome in virtue of the powers conferred by the said section, shall not be assessed by the county council for any such expenses, and the expenses of town councils under the said section shall be defrayed out of the public health general assessment, provided that such expenses shall not be reckoned in any calculation as to the statutory limit of that assessment;

(*b*) a county council may borrow for the purposes of the said section on the security of the general purposes rate in the manner and subject to the conditions prescribed by the Local Government (Scotland) Act, 1889, and a town council may borrow for the purposes of the said section on the security of the public health general assessment in like manner and subject to the like conditions as they may borrow for the purpose of the provision of hospitals.

(2) This Act shall apply to Ireland subject to the following modifications :—

References to the Public Health (Ireland) Acts, 1878 to 1919, shall be substituted for references to the Public Health Acts, 1875 to 1908, and a reference to Article 22 of the Schedule to the Local Government (Application of Enactments) Order, 1898, shall be substituted for the references to section sixty-nine of the Local Government Act, 1888.

20.—(1) This Act may be cited as the Air Navigation Act, 1920.

(2) *The Air Navigation Acts*, 1911 *to* 1919, *are hereby repealed :*

*Provided that any certificate or licence issued under those Acts or under any order made thereunder shall remain in force as though the same had been issued under this Act, and that any orders made by the Secretary of State under those Acts, and in force at the date of the passing of this Act, shall continue in force until revoked or superseded by an Order in Council under this Act, and whilst in force shall have effect as though those Acts were still in force.*[1]

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## SCHEDULE

The Dominion of Canada.
The Commonwealth of Australia (including Norfolk Island and Papua).
The Dominion of New Zealand.
The Union of South Africa.
Newfoundland.
India.

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[1] Sub-section (2) of section 20 was repealed by the Statute Law Revision Act, 1927.

# APPENDIX C

## GENERAL TRANSPORT CONDITIONS OF THE INTERNATIONAL AIR TRANSPORT ASSOCIATION

(Now in force, March, 1932)

### I. As to Passengers and Baggage

#### General Transport Conditions for Passenger Air Services

(Not applicable to the Egypt to India Air Service) [1]

Air Traffic Companies accept passengers and luggage for carriage only upon the following conditions :

1. Every passenger must be in possession of a valid ticket and if a flight to a foreign country is involved, of a regular passport containing the required visa(s) without air traffic companies being under any obligation to attend to the existence or correctness of passports and visas.

This ticket is valid only for the flight, day, person, and the regular service specified therein, unless a special aeroplane is chartered by the Passenger. The ticket is transferable only with the approval of the air traffic company performing the flight specified therein.

Return tickets are valid for the period mentioned thereon. Reservations in connection with return tickets must be booked in the same way as those with single tickets.

2. Passengers must arrive at the aerodrome of departure early enough before the scheduled time of departure to enable passport, customs and luggage formalities to be completed.

[1] These conditions are only applicable to European services. Another series of conditions is used for inter-continental services.

3. The following are precluded from carriage by air :

(*a*) Persons of unsound mind and those suffering from contagious or infectious diseases ; or persons under the influence of drink or drugs :

(*b*) Arms, ammunition, explosives, and corrosives and such other things as are liable to catch fire or otherwise to endanger the aeroplane, passengers or goods :

(*c*) Prohibited imports or things the transport of which is officially prohibited above one of the countries flown over :

(*d*) Things which may cause annoyance to passengers or which—on account of their size, weight, or other conditions—are not suitable for transport by the aircraft of one of the companies co-operating in the transport. Livestock can only be carried by special arrangement.

4. Children under three years accompanied by adults are carried free of charge ; for children from three to seven years half fare shall be paid. Minors will only be carried when they are in the possession of a declaration of their legal guardian consenting to the flight upon these conditions of carriage. Air traffic companies are not compelled to require production of this declaration or to examine.

5. Air traffic companies reserve to themselves the right to refuse to carry any passenger or luggage on any service or flight. If a passenger holding one ticket travels over the lines of several air traffic companies, each company shall be considered the contracting party for its own line.

No claim for repayment of the fare can be considered if the passenger does not arrive or arrives late for the flight booked. If a passage is cancelled before the flight and if the fare paid is not more than the equivalent of 100 gold francs, the fare (less 10 per cent. for cancelling charges and the cost of telegrams and/or telephone calls in connection with cancellation) will be refunded provided that the air traffic company is notified not later than twenty-four hours before the scheduled time of departure. If the fare paid exceeds the equivalent of 100 gold francs then refund on cancellation (less 10 per cent. and the cost of telegrams and/or telephone calls in connection with cancellation) will be made only if the Company is notified not later than forty-eight hours prior to the scheduled time of departure. No refund will be made if a passage is cancelled later than as specified above unless the reservation has been resold. If a flight is cancelled by

the Company on account of weather or for traffic or other reasons or if an aeroplane returns from a flight without interruption to the aerodrome of departure the passenger shall be entitled to repayment of the whole fare. If the flight is uncompleted the passenger shall be entitled to repayment of the fare for the non-flown mileage. Claims for repayment must be lodged within four weeks from the date of the ticket.

6. The air-traffic companies, their employees, sub-contractors and ticket agencies accept no responsibility in connection with the carriage of passengers or luggage. By accepting a ticket or taking a flight the passenger renounces for himself and other individuals who might otherwise be entitled to claim on his behalf all claims for compensation for any damage that may occur to him or his luggage directly or indirectly and however caused while using an aeroplane or otherwise in connection with a flight.[1]

Especially, in the case of being excluded from a flight or in the case of cancellation, delay, or interruption of a flight the passenger shall have no claim to compensation.

7. Passengers are required to comply with all orders given by the officials of the air traffic companies referring to the air service. Any passenger not complying with such orders or the transport regulations is liable for any damage resulting therefrom.

No person is allowed on the aerodrome or near an aeroplane without special permit. Passengers must not enter or leave an aeroplane without instructions from an official of the air traffic company.

The cabin doors must not be opened by the passengers. It is forbidden to throw anything out of the aeroplane on account of the danger to persons and property below.

Unless forbidden by Government regulations smoking or lighting matches in the aeroplane is permitted only if all passengers have agreed to it and no orders to the contrary have been given by the company's officials, either verbally or by notice posted in the aeroplane.

8. Luggage in excess of the free allowance is carried and charged for in accordance with the tariff. Luggage is accepted on the aerodrome. Luggage weighing over 44 lbs. (20 kg.) will be accepted for carriage if space allows, but arrangements for its carriage should be made in advance. Luggage checks are given for each parcel.

Although passengers have no right to require this luggage

[1] A number of Continental decisions upon a similar clause are reported from time to time in the (American) *Journal of Air Law*.

will be carried in the same aeroplane as the passenger if possible and when the load of the aeroplane is within the permissible load. Luggage may be forwarded as air freight.

The agents and officials of the air traffic companies will give information regarding the regulations for the carriage of luggage by all means of transport which are in force in the different countries.

9. Complaints should be made in writing to the head office of the air traffic company performing the carriage. No action for damage can be brought by passengers after the termination of six months from the date of arrival at destination or of the conclusion of the flight.

No claim in respect of luggage can be made or considered unless lodged in writing at the head office of the Company concerned within three days from the time when the luggage should have been delivered at the aerodrome of destination. Claims in respect of passengers must be lodged in the same manner within ten days.

If the transport contract is carried out by several companies the passenger or other individuals entitled to claim on his behalf can proceed only against the company which was engaged in the transport at the time of the event upon which the claim is based.

10. The competent court for decision of all law suits in connection with Passenger Air Services shall be that of the country in which the head office of the air transport company concerned is situated.

Where there exist in any country compulsory legal conditions or regulations with which these transport conditions conflict, such compulsory legal conditions shall apply; but the transport conditions herein contained shall remain effective in so far as they are not expressly overriden by any such compulsory legal conditions.

## II. As to Goods

### General Transport Conditions for Air Freight Services

(Not applicable to Egypt–India Service)

*Sphere of Validity.*

1. The conditions for air freight services apply to all goods which are accepted by an air traffic company for transport by air

accompanied by a consignment note of the International Air Traffic Association. The air traffic companies reserve the right to stipulate separate conditions for special lines.

2. The conditions do not apply to the carriage of goods in a country where goods are subject to compulsory postal regulations.

The air traffic companies reserve the right to refuse to accept any goods for carriage.

3. The following are precluded from carriage by air :

(*a*) Arms, ammunition, explosives, corrosives, or such objects as are liable to catch fire or otherwise to endanger aircraft, goods or passengers :

(*b*) Prohibited imports or things the transport of which is officially prohibited above one of the countries flown over :

(*c*) Objects which may cause annoyance to passengers or which—on account of their size, weight or other conditions—are not suitable for transport by the aircraft of any one of the companies co-operating in the transport. Livestock can only be carried by special arrangement.

*Weight, Size, Mark, Manner of Packing.*

4. Normally the dimensions of air goods must not exceed 3 ft. 4 in. × 1 ft. 8 in. × 1 ft. 8 in. (100 × 50 × 50 cm.). Air transport of goods of larger dimensions must be the subject of special arrangements to be made in advance with the air transport companies.

NOTE.—For carriage on routes operated by Imperial Airways, Ltd., cases are accepted without special arrangements up to 3 ft. 6 in. × 2 ft. 6 in. × 2 ft. 3 in.

5. Goods must conform to general requirements as to fitness for transport. All goods must bear the addresses of both the consignor and consignee written legibly in Latin characters in a durable manner.

*Consignment Note.*

6. Every consignment must be accompanied by a consignment note of the International Air Traffic Association completed in all parts.

The consignor or his representative must sign the consignment note. The consignor guarantees the correctness of all declarations contained in the consignment note.

Every consignment note must be completed by the consignor in triplicate at least. The consignor is entitled to add a fourth copy which the air traffic company will return to him countersigned.

The validity of the contract shall not be affected if the consignment note is not made out or if it is incorrectly made out or lost.

*Documents Attached.*

7. The consignor shall annex to the consignment note all such documents as are required to comply with all existing customs—fiscal—or police regulations before delivery to the consignee. The consignor shall indemnify the air transport company against all consequences resulting from the absence of these documents or their being inaccurate or not complying with the regulations. It is not the duty of the air transport company to examine the correctness or completeness of the documents.

*Payment of Freight.*

8. Goods are carried at the published rates. Freight and other charges for transport may either be prepaid by the consignor or paid for on delivery by the consignee. The Companies however reserve the right to demand prepayment of all charges for any consignment. Sender's C.O.D.'s will be collected.

*Liability ; Insurance.*

9. The air traffic companies, their employees and the undertakings and individuals which the air traffic companies employ in the performance of their obligations, accept freight for carriage only at the risk of the senders or their authorized agents. No responsibility is accepted for loss, damage or delay caused directly or indirectly during the conveyance by aeroplane or otherwise in connection therewith. This refers to all obligations of the company either in respect of carriage, storage or any other operations in connection with goods.

If the consignor declares an insurance value, it shall be taken as a request to the company by the consignor that the company will, at the consignor's expense and as agent for the consignor, insure the goods for the declared value. The consignor is offered facilities to insure against transport risks including cartage at both departure and arrival stations.

10. Air traffic companies accept no responsibility for delivering goods within a certain time or for carrying goods by a certain aircraft, even if special instructions have been given.

In the case of emergency landings and longer interruptions, or if for any reason any companies cannot transport or forward goods by air, the companies are entitled to hand over the goods to another transport organization for forwarding, and no claim for refund of charges paid can be admitted.

*Delivery of Goods.*

11. In so far as no other arrangements have been made, the arrival of goods will be advised by telephone or by letter to the consignee. The consignee is entitled to collect the consignment. If he does not collect the consignment it will be delivered to him against payment of the costs.

*Claims.*

12. If goods are accepted by the consignee without reservation, no claim can be brought forward subsequently. The consignee, however, may lodge a claim within three days with the delivering company or its agents in so far as concerns defects which could not have been discovered at the time of delivery. All claims must be endorsed on the consignment note or delivered in writing to the company or its agents. The company shall be entitled to immediate inspection of goods in respect of which a claim is made.

*Refusal by Consignee.*

13. If for any reason whatsoever goods cannot be delivered the consignor shall indemnify the companies against all expenses resulting therefrom including any ultimate return charges. If the goods are perishable or if it is impossible to return them, air transport companies and their agents are entitled to sell the goods forthwith without notice in order to recover any outstanding expenses.

*Reforwarding.*

14. If, after carriage by air, goods are to be reforwarded by other means (for example by railway) the consignor shall insert in the consignment note the name and address of the agent or person to which the goods are to be delivered for reforwarding. The agent or person so designated shall be considered to be the consignee for all purposes so far as concerns the air transport company. The air transport companies will, on request, undertake responsibility for handing the goods to other means of transport for forwarding. The companies reserve to themselves the right of employing a shipping and forwarding agent.

*Actions.*

15. No action against air traffic companies can be commenced after six months calculated from the date of arrival of goods at the place of destination or other termination of the transport. If the air traffic contract is performed by several air traffic companies, only the company which was carrying the goods at the time when the accident or other incident occurred on which the claim is based can be sued. If the claimant does not know the name of this company, and if the address of this company is not given within four weeks after application by registered letter addressed to the first or the last air traffic company which participated in the transport, the sender is authorized to sue the first, and the person entitled to receive the goods is authorized to sue the last of the air traffic companies concerned.

The competent court for decision of all lawsuits shall be that of the country in which the head office of the air transport company concerned is situated.

*Legal Regulations.*

16. So far as there exist in any country compulsory legal conditions or regulations with which the present forwarding conditions conflict such compulsory legal conditions shall apply; but the transport conditions herein contained shall remain effective in so far as they are not expressly overridden by such compulsory legal conditions.

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" All goods subject to the General Transport Conditions for Air Freight Services set out above which are received by or in the custody of Messrs. Imperial Airways, Limited (who are not Common Carriers and do not accept the obligations or liability of Common Carriers) or their agents for carriage or otherwise, are subject, *in England*, to a particular and general lien for all moneys due in respect of the said goods or on a general account with the Consignor or Consignee. If sums due to Messrs. Imperial Airways, Limited, are not paid within 14 days after notice requiring payment is given to the party chargeable, the goods may be sold without further notice to Consignor or Consignee, and the net proceeds of the sale thereof retained in satisfaction or part satisfaction (as the case may be) of the debt in respect of which Messrs. Imperial Airways, Limited, had a lien. Such goods may be sold by auction or otherwise, in the discretion of Messrs. Imperial Airways, Limited."

## AUTHOR'S NOTES

A few remarks may be made upon some of the clauses in the freight contract.

(*a*) In the first place we must take note of the emphatic and repeated repudiation of any suggestion that the companies are or accept the obligations of common carriers, which is implicit in clause 2 above, and express in the final clause above which applies to England and appears on the Consignment Note used by Imperial Airways, Ltd. For the reasons mentioned above I think that these expressions must suffice to exclude both the common law obligation to carry for all and sundry, and the common law liability as an " insurer," so that an air carrier in this position is an ordinary bailee, and the basis of his liability is negligence.

(*b*) Clause 9, it is submitted, illustrates the difficulty of attempting to achieve international uniformity in a matter which is governed by the laws of different countries. It may afford in other countries the protection which it is evidently designed to achieve, but for English purposes it leaves much to be desired. There is no question that the carrier by air is, as a matter of public policy, permitted by law to protect himself completely against all claims for loss or damage. The only question is whether by this clause he has done it. Words must be construed in the light of their context, and accordingly actual expressions which have formed the subject-matter of litigation must be regarded as illustrations rather than as precedents. On the one hand, we find a series of decisions in which " omnibus " words have sufficed to protect carriers of various kinds : " under any circumstances whatsoever," [1] or " in any circumstances," [2] or " under any circumstances " [3] (all occurring in bills of lading), or " any injury, delay, loss, or damage, however caused," [4] occurring in a free pass for a passenger by rail and steamer combined, or " not responsible for any damage to goods however caused which can be covered by insurance " [4] occurring in a lighterman's contract. On the other hand, there are decisions of the type of *Steinman* v. *Angier Line* and *Price* v. *Union Lighterage Co.*, which have been referred to earlier (on pp. 117–119). The unsatisfactory state of the English authorities upon the subject is illustrated by Lord Justice Scrutton in the work

[1] *Taubman* v. *Pacific Steam Navigation Co.* (1872) 26 L. T. (N.S.) 704.
[2] *Thompson* v. *Royal Mail Steam Packet Co.* (1875) 5 Aspinall's *Maritime Law Cases*, 190 n.
[3] *Haigh* v. *Royal Mail Steam Packet Co.* (1883) 52 L. J. (Q.B.) 640.
[4] *The Stella* [1900] P. 161.

above quoted where he points out [1] the result of the authorities to be " that the words ' not responsible for damage capable of being covered by insurance ' [2] do *not* protect a shipowner from liability for negligence, while the words ' not responsible for damage, however caused, which is capable of being covered by insurance ' [3] *do* so protect him. The reason given is that the latter words direct attention to causation and the former do not."

The expression " only at the risk of the senders or their authorized agents " is reminiscent of expressions which have been litigated upon many times. In the first place, it is somewhat strange that an attempt should be made to place the risk of transit upon the consignors or their agents instead of the owners or their agents (who would usually include the consignors). The property in the goods while in transit is frequently in the consignee whose agent the consignor is for the purpose of making the contract of carriage. That is, however, merely incidental. It would not be profitable to examine the numerous cases in which expressions such as " owner's risk," " merchant's risk," etc., have occurred, because such decisions depend upon the whole circumstances of the case. It is, however, pertinent to refer to the discussion of these cases by the late Judge Carver in the work quoted above,[4] and to point out that a number of decisions show that these words cannot be taken at their face value.

If the view suggested above [5] is correct, namely, that a carrier by air who has effectively repudiated any obligation to carry for all and sundry is an ordinary bailee and his liability is based on negligence, then his position is stronger than that of most shipowners carrying under bills of lading, and there are doubtless clauses which would not suffice to protect the latter but would suffice to protect the former. Such an air carrier remains, however, subject to the rule that an ambiguous document will not protect the person who puts it forward as the basis of the contract with those who deal with him. The opinion which I am inclined, though with diffidence, to submit is that the air carrier who carries upon the basis of the " General Transport Conditions " examined above, supplemented by the express repudiation of the status and liability of a common carrier quoted above, is merely an ordinary bailee, and in construing his special contracts we must seek for analogy not in the case of the shipowner or bargeowner or land carrier, but in such cases as *Rutter*

[1] Article 89.
[2] Which is substantially the clause in *Price* v. *Union Lighterage Co.*, *supra*.
[3] *Joseph Travers & Sons* v. *Cooper* [1915] 1 K. B. 73.
[4] *Carriage by Sea* (7th ed., 1925), sect. 103.
[5] On pp. 117–119.

v. *Palmer*, *Turner* v. *Civil Service Supply Association*, and *Fagan* v. *Green and Edwards, Ltd.*[1] At the same time the carrier by air is under a duty, unless he qualifies it by special contract, to furnish a vehicle which is as fit as human skill and care can make it, and this duty is probably not excluded by the use of expressions which can receive adequate effect by being applied to the conduct of the voyage. One of the best illustrations of this principle is to be found in *The West Cock*,[2] where the Court of Appeal held that whether the contract of a tug-owner in supplying a tug for the towage of a vessel is subject to a warranty of fitness akin to the shipowner's warranty of seaworthiness, or merely to " an implied obligation to provide a tug in a fit and efficient condition so far as skill and care can discover its condition," he is not protected by a clause the terms of which may reasonably be construed as applying " to circumstances occurring after the commencement of, and during, the towage and not to the state of things existing before the towage began." I submit that the adequacy of these General Transport Conditions, regarded as a protection for the carrier, is open to serious question from this point of view.[3]

(*c*) In spite of the repudiation of liability contained in clauses 9 and 10, there are two clauses, 12 and 15, which regulate the making of claims and the bringing of actions. Similar clauses have occurred in bills of lading and railway consignment notes, and it is relevant to notice the policy of the courts in giving effect to them. There is nothing contrary to public policy as interpreted by the common law in a clause which limits the time within which a claim must be made or an action brought, and such clauses are constantly enforced. But two points must be noted. (1) Such clauses must be free from ambiguity, and, if ambiguous, are construed against the carrier who puts them forward. (2) In the case of carriage by sea such clauses afford no protection if the warranty of seaworthiness, that is, the absolute duty to provide a seaworthy ship, is broken. It remains to be seen whether, in a case such as carriage by air where there is believed to be no warranty, no absolute duty, but merely a duty to furnish a vehicle as fit as human skill and care can make it, a breach of that duty equally entails the forfeiture of the protection stipulated for by similar clauses. A discussion of the relevant principles in the case of a bill of lading will be found in *Bank of Australia* v. *Clan Line Steamers, Ltd.*,[4] where, however, it will be noted, the warranty of seaworthiness was express and not implied.

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[1] *Supra*, p. 118.

[2] [1911] P. 23, 208.

[3] See Scrutton, L.J., in *Kidston* v. *Deutsche Luft Hansa A.-G.* (1930) 38 Lloyd's List Law Reports, at p. 2 (first column) and p. 3 (first column).

[4] [1916] 1 K. B. 39.

# APPENDIX D

## THE WARSAW CONVENTION OF OCTOBER 12, 1929

(Not yet in force, March, 1932)

POUR L'UNIFICATION DE CERTAINES RÈGLES RELATIVES AU TRANSPORT AÉRIEN INTERNATIONAL [1]

Le Président du Reich Allemand, le Président Fédéral de la République d'Autriche, sa Majesté le Roi des Belges, le Président des États-Unis du Brésil, sa Majesté le Roi des Bulgares, le Président du Gouvernement Nationaliste de Chine, sa Majesté le Roi de Danemark et d'Islande, sa Majesté le Roi d'Égypte, sa Majesté le Roi d'Espagne, le Chef d'État de la République d'Estonie, le Président de la République de Finlande, le Président de la République Française, sa Majesté le Roi de Grande-Bretagne, d'Irlande et des Territoires Britanniques au delà des Mers, Empereur des Indes, le Président de la République Hellénique, son Altesse Sérénissime le Régent du Royaume de Hongrie, sa Majesté le Roi d'Italie, sa Majesté l'Empereur du Japon, le Président de la République de Lettonie, son Altesse Royale la Grande Duchesse de Luxembourg, le Président des États-Unis du Méxique, sa Majesté le Roi de Norvège, sa Majesté la Reine des Pays-Bas, le Président de la République de Pologne, sa Majesté le Roi de Roumanie, sa Majesté le Roi de Suède, le Conseil Fédéral Suisse, le Président de la République Tchécoslovaque, le Comité Central Exécutif de l'Union des Républiques Soviétistes Socialistes, le Président des États-Unis du Vénézuéla, sa Majesté le Roi de Yougoslavie,

ayant reconnu l'utilité de régler d'une manière uniforme les conditions du transport aérien international en ce qui concerne les documents utilisés pour ce transport et la responsabilité du transporteur,

cet effet ont nommé leurs Plénipotentiaires respectifs lesquels, dûment autorisés, ont conclu et signé la Convention suivante :

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[1] There is no official English text.

## CHAPITRE PREMIER

### OBJET—DÉFINITIONS

### *Article Premier*

(1) La présente Convention s'applique à tout transport international de personnes, bagages ou marchandises, effectué par aéronef contre rémunération. Elle s'applique également aux transports gratuits effectués par aéronef par une entreprise de transports aériens.

(2) Est qualifié " transport international," au sens de la présente Convention, tout transport dans lequel, d'après les stipulations des parties, le point de départ et le point de destination, qu'il y ait ou non interruption de transport ou transbordement, sont situés soit sur le territoire de deux Hautes Parties Contractantes, soit sur le territoire d'une seule Haute Partie Contractante, si une escale est prévue dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une autre Puissance même non Contractante. Le transport sans une telle escale entre les territoires soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité de la même Haute Partie Contractante n'est pas considéré comme international au sens de la présente Convention.

(3) Le transport à exécuter par plusieurs transporteurs par air successifs est censé constituer pour l'application de cette Convention un transport unique lorsqu'il a été envisagé par les parties comme une seule opération, qu'il ait été conclu sous la forme d'un seul contrat ou d'une série de contrats et il ne perd pas son caractère international par le fait qu'un seul contrat ou une série de contrats doivent être exécutés intégralement dans un territoire soumis à la souveraineté, à la suzeraineté, au mandat ou à l'autorité d'une même Haute Partie Contractante.

### *Article 2*

(1) La Convention s'applique aux transports effectués par l'État ou les autres personnes juridiques de droit public, dans les conditions prévues à l'article 1er.

(2) Sont exceptés de l'application de la présente Convention les transports effectués sous l'empire de conventions postales internationales.

## CHAPITRE II

### TITRES DE TRANSPORT

### *Section I.—Billet de Passage*

#### *Article* 3

(1) Dans le transport de voyageurs, le transporteur est tenu de délivrer un billet de passage qui doit contenir les mentions suivantes :

(*a*) le lieu et la date de l'émission ;
(*b*) les points de départ et de destination ;
(*c*) les arrêts prévus, sous réserve de la faculté pour le transporteur de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international ;
(*d*) le nom et l'adresse du ou des transporteurs ;
(*e*) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(2) L'absence, l'irrégularité ou la perte du billet n'affecte ni l'existence, ni la validité du contrat de transport, qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte le voyageur sans qu'il ait été délivré un billet de passage, il n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

### *Section II.—Bulletin de Bagages*

#### *Article* 4

(1) Dans le transport de bagages, autres que les menus objets personnels dont le voyageur conserve la garde, le transporteur est tenu de délivrer un bulletin de bagages.

(2) Le bulletin de bagages est établi en deux exemplaires, l'un pour le voyageur, l'autre pour le transporteur.

(3) Il doit contenir les mentions suivantes :

(*a*) le lieu et la date de l'émission ;
(*b*) les points de départ et de destination ;
(*c*) le nom et l'adresse du ou des transporteurs ;
(*d*) le numéro du billet de passage ;
(*e*) l'indication que la livraison des bagages est faite au porteur du bulletin ;
(*f*) le nombre et le poids des colis ;

(*g*) le montant de la valeur déclarée conformément à l'article 22 alinéa 2 ;

(*h*) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

(4) L'absence, l'irrégularité ou la perte du bulletin n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention. Toutefois si le transporteur accepte les bagages sans qu'il ait été délivré un bulletin ou si le bulletin ne contient pas les mentions indiquées sous les lettres (*d*), (*f*), (*h*), le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

### *Section III.—Lettre de Transport Aérien*

#### *Article* 5

(1) Tout transporteur de marchandises a le droit de demander à l'expéditeur l'établissement et la remise d'un titre appelé : " lettre de transport aérien " ; tout expéditeur a le droit de demander au transporteur l'acceptation de ce document.

(2) Toutefois, l'absence, l'irrégularité ou la perte de ce titre n'affecte ni l'existence, ni la validité du contrat de transport qui n'en sera pas moins soumis aux règles de la présente Convention, sous réserve des dispositions de l'article 9.

#### *Article* 6

(1) La lettre de transport aérien est établie par l'expéditeur en trois exemplaires originaux et remise avec la marchandise.

(2) Le premier exemplaire porte la mention " pour le transporteur " ; il est signé par l'expéditeur. Le deuxième exemplaire porte la mention " pour le destinataire " ; il est signé par l'expéditeur et le transporteur et il accompagne la marchandise. Le troisième exemplaire est signé par le transporteur et remis par lui à l'expéditeur après acceptation de la marchandise.

(3) La signature du transporteur doit être apposée dès l'acceptation de la marchandise.

(4) La signature du transporteur peut être remplacée par un timbre ; celle de l'expéditeur peut être imprimée ou remplacée par un timbre.

(5) Si, à la demande de l'expéditeur, le transporteur établit la lettre de transport aérien, il est considéré jusqu'à preuve contraire, comme agissant pour le compte de l'expéditeur.

*Article 7*

Le transporteur de marchandises a le droit de demander à l'expéditeur l'établissement de lettres de transport aérien différentes lorsqu'il y a plusieurs colis.

*Article 8*

La lettre de transport aérien doit contenir les mentions suivantes :

(*a*) le lieu où le document a été créé et la date à laquelle il a été établi ;
(*b*) les points de départ et de destination ;
(*c*) les arrêts prévus, sous réserve de la faculté, pour le transporteur, de stipuler qu'il pourra les modifier en cas de nécessité et sans que cette modification puisse faire perdre au transport son caractère international ;
(*d*) le nom et l'adresse de l'expéditeur ;
(*e*) le nom et l'adresse du premier transporteur ;
(*f*) le nom et l'adresse du destinataire, s'il y a lieu ;
(*g*) la nature de la marchandise ;
(*h*) le nombre, le mode d'emballage, les marques particulières ou les numéros des colis ;
(*i*) le poids, la quantité, le volume ou les dimensions de la marchandise ;
(*j*) l'état apparent de la marchandise et de l'emballage ;
(*k*) le prix du transport, s'il est stipulé, la date et le lieu de paiement et la personne qui doit payer ;
(*l*) si l'envoi est fait contre remboursement, le prix des marchandises et, éventuellement, le montant des frais ;
(*m*) le montant de la valeur déclarée conformément à l'article 22, alinéa 2 ;
(*n*) le nombre d'exemplaires de la lettre de transport aérien ;
(*o*) les documents transmis au transporteur pour accompagner la lettre de transport aérien ;
(*p*) le délai de transport et indication sommaire de la voie à suivre (*via*) s'ils ont été stipulés ;
(*q*) l'indication que le transport est soumis au régime de la responsabilité établi par la présente Convention.

*Article 9*

Si le transporteur accepte des marchandises sans qu'il ait été établi une lettre de transport aérien, ou si celle-ci ne contient pas toutes les mentions indiquées par l'article 8 [(*a*) à (*i*) inclusive-

ment et (*q*)], le transporteur n'aura pas le droit de se prévaloir des dispositions de cette Convention qui excluent ou limitent sa responsabilité.

*Article* 10

(1) L'expéditeur est responsable de l'exactitude des indications et déclarations concernant la marchandise qu'il inscrit dans la lettre de transport aérien.

(2) Il supportera la responsabilité de tout dommage subi par le transporteur ou toute autre personne à raison de ses indications et déclarations irrégulières, inexactes ou incomplètes.

*Article* 11

(1) La lettre de transport aérien fait foi, jusqu'à preuve contraire, de la conclusion du contrat, de la réception de la marchandise et des conditions du transport.

(2) Les énonciations de la lettre de transport aérien, relatives au poids, aux dimensions et à l'emballage de la marchandise ainsi qu'au nombre des colis font foi jusqu'à preuve contraire ; celles relatives à la quantité, au volume et à l'état de la marchandise ne font preuve contre le transporteur qu'autant que la vérification en a été faite par lui en présence de l'expéditeur, et constatée sur la lettre de transport aérien, ou qu'il s'agit d'énonciations relatives à l'état apparent de la marchandise.

*Article* 12

(1) L'expéditeur a le droit sous la condition d'exécuter toutes les obligations résultant du contrat de transport, de disposer de la marchandise, soit en la retirant à l'aérodrome de départ ou de destination, soit en l'arrêtant en cours de route lors d'un atterrissage, soit en la faisant délivrer au lieu de destination ou en cours de route à une personne autre que le destinataire indiqué sur la lettre de transport aérien, soit en demandant son retour à l'aérodrome de départ, pour autant que l'exercice de ce droit ne porte préjudice ni au transporteur, ni aux autres expéditeurs et avec l'obligation de rembourser les frais qui en résultent.

(2) Dans le cas ou l'exécution des ordres de l'expéditeur est impossible, le transporteur doit l'en aviser immédiatement.

(3) Si le transporteur se conforme aux ordres de disposition de l'expéditeur, sans exiger la production de l'exemplaire de la lettre de transport aérien délivré à celui-ci, il sera responsable, sauf son recours contre l'expéditeur, du préjudice qui pourrait

être causé par ce fait à celui qui est régulièrement en possession de la lettre de transport aérien.

(4) Le droit de l'expéditeur cesse au moment où celui du destinataire commence, conformément à l'article 13 ci-dessous. Toutefois, si le destinataire refuse la lettre de transport ou la marchandise, ou s'il ne peut être atteint, l'expéditeur reprend son droit de disposition.

*Article* 13

(1) Sauf dans les cas indiqués à l'article précédent, le destinataire a le droit, dès l'arrivée de la marchandise au point de destination, de demander au transporteur de lui remettre la lettre de transport aérien et de lui livrer la marchandise contre le paiement du montant des créances et contre l'exécution des conditions de transport indiquées dans la lettre de transport aérien.

(2) Sauf stipulation contraire, le transporteur doit aviser le destinataire dès l'arrivée de la marchandise.

(3) Si la perte de la marchandise est reconnue par le transporteur ou si, à l'expiration d'un délai de sept jours après qu'elle aurait dû arriver, la marchandise n'est pas arrivée, le destinataire est autorisé à faire valoir vis-à-vis du transporteur les droits résultant du contrat de transport.

*Article* 14

L'expéditeur et le destinataire peuvent faire valoir tous les droits qui leur sont respectivement conférés par les articles 12 et 13, chacun en son propre nom, qu'il agisse dans son propre intérêt ou dans l'intérêt d'autrui, à condition d'exécuter les obligations que le contrat impose.

*Article* 15

(1) Les articles 12, 13, et 14 ne portent aucun préjudice ni aux rapports de l'expéditeur et du destinataire entre eux, ni aux rapports des tiers dont les droits proviennent, soit du transporteur, soit du destinataire.

(2) Toute clause dérogeant aux stipulations des articles 12, 13 et 14 doit être inscrite dans la lettre de transport aérien.

*Article* 16

(1) L'expéditeur est tenu de fournir les renseignements et de joindre à la lettre de transport aérien les documents qui, avant

la remise de la marchandise au destinataire, sont nécessaires à l'accomplissement des formalités de douane, d'octroi ou de police. L'expéditeur est responsable envers le transporteur de tous dommages qui pourraient résulter de l'absence, de l'insuffisance ou de l'irrégularité de ces renseignements et pièces, sauf le cas de faute de la part du transporteur ou de ses préposés.

(2) Le transporteur n'est pas tenu d'examiner si ces renseignements et documents sont exacts ou suffisants.

## CHAPITRE III

## RESPONSABILITÉ DU TRANSPORTEUR

### *Article* 17

Le transporteur est responsable du dommage survenu en cas de mort, de blessure ou de toute autre lésion corporelle subie par un voyageur lorsque l'accident qui a causé le dommage s'est produit à bord de l'aéronef ou au cours de toutes opérations d'embarquement et de débarquement.

### *Article* 18

(1) Le transporteur est responsable du dommage survenu en cas de destruction, perte ou avarie de bagages enregistrés ou de marchandises lorsque l'événement qui a causé le dommage s'est produit pendant le transport aérien.

(2) Le transport aérien, au sens de l'alinéa précédent, comprend la période pendant laquelle les bagages ou marchandises se trouvent sous la garde du transporteur, que ce soit dans un aérodrome ou à bord d'un aéronef ou dans un lieu quelconque en cas d'atterrissage en dehors d'un aérodrome.

(3) La période du transport aérien ne couvre aucun transport terrestre, maritime ou fluvial effectué en dehors d'un aérodrome. Toutefois lorsqu'un tel transport est effectué dans l'exécution du contrat de transport aérien en vue du chargement, de la livraison ou du transbordement, tout dommage est présumé, sauf preuve contraire, résulter d'un événement survenu pendant le transport aérien.

### *Article* 19

Le transporteur est responsable du dommage résultant d'un retard dans le transport aérien de voyageurs, bagages ou marchandises.

*Article* 20

(1) Le transporteur n'est pas responsable s'il prouve que lui et ses préposés ont pris toutes les mesures nécéssaires pour éviter le dommage ou qu'il leur était impossible de les prendre.

(2) Dans les transports de marchandises et de bagages, le transporteur n'est pas responsable, s'il prouve que le dommage provient d'une faute de pilotage, de conduite de l'aéronef ou de navigation, et que, à tous autres égards, lui et ses préposés ont pris toutes les mesures nécessaires pour éviter le dommage.

*Article* 21

(1) Dans le cas où le transporteur fait la preuve que la faute de la personne lésée a causé le dommage ou y a contribué, le tribunal pourra, conformément aux dispositions de sa propre loi, écarter ou atténuer la responsabilité du transporteur.

*Article* 22

(1) Dans le transport des personnes, la responsabilité du transporteur envers chaque voyageur est limitée à la somme de cent vingt-cinq mille francs. Dans le cas où, d'après la loi du tribunal saisi, l'indemnité peut être fixée sous forme de rente, le capital de la rente ne peut dépasser cette limite. Toutefois par une convention spéciale avec le transporteur, le voyageur pourra fixer une limite de responsabilité plus élevée.

(2) Dans le transport de bagages enregistrés et de marchandises, la responsabilité du transporteur est limitée à la somme de deux cent cinquante francs par kilogramme, sauf déclaration spéciale d'intérêt à la livraison faite par l'expéditeur au moment de la remise du colis au transporteur et moyennant le paiement d'une taxe supplémentaire éventuelle. Dans ce cas, le transporteur sera tenu de payer jusqu'à concurrence de la somme déclarée, à moins qu'il ne prouve qu'elle est supérieure à l'intérêt réel de l'expéditeur à la livraison.

(3) En ce qui concerne les objets dont le voyageur conserve la garde, la responsabilité du transporteur est limitée à cinq mille francs par voyageur.

(4) Les sommes indiquées ci-dessus sont considérées comme se rapportant au franc français constitué par soixante-cinq, et demie milligrammes d'or au titre de neuf cents millièmes de fin. Elles pourront être converties dans chaque monnaie nationale en chiffres ronds.

*Article 23*

(1) Toute clause tendant à exonérer le transporteur de sa responsabilité ou à établir une limite inférieure à celle qui est fixée dans la présente Convention est nulle et de nul effet, mais la nullité de cette clause n'entraîne pas la nullité du contrat qui reste soumis aux dispositions de la présente Convention.

*Article 24*

(1) Dans les cas prévus aux articles 18 et 19 toute action en responsabilité, à quelque titre que ce soit, ne peut être exercée que dans les conditions et limites prévues par la présente Convention.

(2) Dans les cas prévus à l'article 17, s'appliquent également les dispositions de l'alinéa précédent, sans préjudice de la détermination des personnes qui ont le droit d'agir et de leurs droits respectifs.

*Article 25*

(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi du tibunal saisi, est considérée comme équivalente au dol.

(2) Ce droit lui sera également refusé si le dommage a été causé dans les mêmes conditions par un de ses préposés agissant dans l'exercice de ses fonctions.

*Article 26*

(1) La réception des bagages et marchandises sans protestation par le destinataire constituera présomption, sauf preuve contraire, que les marchandises ont été livrées en bon état et conformément au titre de transport.

(2) En cas d'avarie le destinataire doit adresser au transporteur une protestation immédiatement après la découverte de l'avarie et, au plus tard, dans un délai de trois jours pour les bagages et de sept jours pour les marchandises à dater de leur réception. En cas de retard la protestation devra être faite au plus tard dans les quatorze jours à dater du jour où le bagage ou la marchandise auront été mis à sa disposition.

(3) Toute protestation doit être faite par réserve inscrite sur le titre de transport ou par un autre écrit expédié dans le délai prévu pour cette protestation.

(4) A défaut de protestation dans les délais prévus, toutes actions contre le transporteur sont irrecevables, sauf le cas de fraude de celui-ci.

*Article* 27

En cas de décès du débiteur, l'action en responsabilité, dans les limites prévues par la présente Convention, s'exerce contre ses ayant-droits.

*Article* 28

(1) L'action en responsabilité devra être portée, au choix du demandeur, dans le territoire d'une des Hautes Parties Contractantes, soit devant le tribunal du domicile du transporteur, du siège principal de son exploitation ou du lieu où il possède un établissement par le soin duquel le contrat a été conclu, soit devant le tribunal du lieu de destination.

(2) La procédure sera réglée par la loi du tribunal saisi.

*Article* 29

(1) L'action en responsabilité doit être intentée, sous peine de déchéance, dans le délai de deux ans à compter de l'arrivée à destination ou du jour où l'aéronef aurait dû arriver, ou de l'arrêt du transport.

(2) Le mode du calcul du délai est déterminé par la loi du tribunal saisi.

*Article* 30

(1) Dans les cas de transport régis, par la définition du troisième alinéa de l'article premier, à exécuter par divers transporteurs successifs, chaque transporteur acceptant des voyageurs, des bagages ou des marchandises est soumis aux règles établies par cette Convention, et est censé être une des parties contractantes du contrat de transport, pour autant que ce contrat ait trait à la partie du transport effectuée sous son contrôle.

(2) Au cas d'un tel transport, le voyageur ou ses ayants-droits ne pourront recourir que contre le transporteur ayant effectué le transport au cours duquel l'accident ou le retard s'est produit, sauf dans le cas où, par stipulation expresse, le premier transporteur aura assuré la responsabilité pour tout le voyage.

(3) S'il s'agit de bagages ou de marchandises, l'expéditeur aura recours contre le premier transporteur et le destinataire qui a le droit à la délivrance contre le dernier, et l'un et l'autre pourront, en outre, agir contre le transporteur ayant effectué le transport au cours duquel la destruction, la perte, l'avarie ou le retard se sont produits. Ces transporteurs seront solidairement responsables envers l'expéditeur et le destinataire.

## CHAPITRE IV

### DISPOSITIONS RELATIVES AUX TRANSPORTS COMBINÉS

*Article* 31

(1) Dans le cas de transports combinés effectués en partie par air et en partie par tout autre moyen de transport, les stipulations de la présente Convention ne s'appliquent qu'au transport aérien et si celui-ci répond aux conditions de l'article premier.

(2) Rien dans la présente Convention n'empêche les parties, dans le cas de transports combinés, d'insérer dans le titre de transport aérien des conditions relatives à d'autres modes de transport, à condition que les stipulations de la présente Convention soient respectées en ce qui concerne le transport par air.

## CHAPITRE V

### DISPOSITIONS GENÉRALES ET FINALES

*Article* 32

(1) Sont nulles toutes clauses du contrat de transport et toutes conventions particulières antérieures au dommage par lesquelles les parties dérogeraient aux règles de la présente Convention soit par une détermination de la loi applicable, soit par une modification des règles de compétence. Toutefois, dans le transport des marchandises, les clauses d'arbitrage sont admises, dans les limites de la présente Convention, lorsque l'arbitrage doit s'effectuer dans les lieux de compétence des tribunaux prévus à l'article 28 alinéa 1.

*Article* 33

Rien dans la présente Convention ne peut empêcher un transporteur de refuser la conclusion d'un contrat de transport ou de formuler des règlements qui ne sont pas en contradiction avec les dispositions de la présente Convention.

*Article* 34

La présente Convention n'est applicable ni aux transports aériens internationaux exécutés à titre de premiers essais par des entreprises de navigation aérienne en vue de l'établissement de lignes régulières de navigation aérienne ni aux transports effectués dans des circonstances extraordinaires en dehors de toute opération normale de l'exploitation aérienne.

*Article* 35

Lorsque dans la présente Convention il est question de jours, il s'agit de jours courants et non de jours ouvrables.

*Article* 36

La présente Convention est rédigée en français en un seul exemplaire qui restera déposé aux archives du Ministère des Affaires Étrangères de Pologne, et dont une copie certifiée conforme sera transmise par les soins du Gouvernement Polonais au Gouvernement de chacune des Hautes Parties Contractantes.

*Article* 37

(1) La présente Convention sera ratifié. Les instruments de ratification seront déposés aux archives du Ministère des Affaires Étrangères de Pologne, qui en notifiera le dépôt au Gouvernement de chacune des Hautes Parties Contractantes.

(2) Dès que la présente Convention aura été ratifiée par cinq des Hautes Parties Contractantes, elle entrera en vigueur entre Elles le quatre-vingt-dixième jour après le dépôt de la cinquième ratification. Ultérieurement elle entrera en vigueur entre les Hautes Parties Contractantes qui l'auront ratifiée et la Haute Partie Contractante qui déposera son instrument de ratification le quatre-vingt-dixième jour après son dépôt.

(3) Il appartiendra au Gouvernement de la République de Pologne de notifier au Gouvernement de chacune des Hautes Parties Contractantes la date de l'entrée en vigueur de la présente Convention ainsi que la date du dépôt de chaque ratification.

*Article* 38

(1) La présente Convention, après son entrée en vigueur, restera ouverte à l'adhésion de tous les États.

(2) L'adhésion sera effectuée par une notification adressée au Gouvernement de la République de Pologne, qui en fera part au Gouvernement de chacune des Hautes Parties Contractantes.

(3) L'adhésion produira ses effets à partir du quatre-vingt-dixième jour aprés la notification faite au Gouvernement de la République de Pologne.

*Article* 39

(1) Chacune des Hautes Parties Contractantes pourra dénoncer la présente Convention par une notification faite au Gouvernement

de la République de Pologne, qui en avisera immédiatement le Gouvernement de chacune des Hautes Parties Contractantes.

(2) La dénonciation produira ses effets six mois après la notification de la dénonciation et seulement à l'égard de la Partie qui y aura procédé.

*Article* 40

(1) Les Hautes Parties Contractantes pourront, au moment de la signature, du dépôt des ratifications, ou de leur adhésion, déclarer que l'acceptation qu'Elles donnent à la présente Convention ne s'applique pas à tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou à tout autre territoire sous suzeraineté.

(2) En conséquence Elles pourront ultérieurement adhérer séparément au nom de tout ou partie de leurs colonies, protectorats, territoire sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou tout territoire sous suzeraineté ainsi exclus de leur déclaration originelle.

(3) Elles pourront aussi, en se conformant à ses dispositions, dénoncer la présente Convention séparément ou pour tout ou partie de leurs colonies, protectorats, territoires sous mandat, ou tout autre territoire soumis à leur souveraineté ou à leur autorité, ou tout autre territoire sous suzeraineté.

*Article* 41

Chacune des Hautes Parties Contractantes aura la faculté au plus tôt deux ans après la mise en vigueur de la présente Convention de provoquer la réunion d'une nouvelle Conférence Internationale dans le but de rechercher les améliorations qui pourraient être apportées à la présente Convention. Elle s'adressera dans ce but au Gouvernement de la République Française qui prendra les mesures nécessaires pour préparer cette Conférence.

La présente Convention, faite à Varsovie le 12 Octobre 1929 restera ouverte à la signature jusqu'au 31 Janvier 1930.

NOTE.—The signatures are omitted. Up to March 1, 1932, twenty-three countries (including Great Britain) have signed and four (not including Great Britain) have ratified. It comes into force, so far as concerns each State which may ratify it, ninety days after deposit of its ratification, a minimum of five ratifications being necessary to bring it into force (see Article 37). If and

when it is ratified by Great Britain and comes into force, certain very considerable changes in the English law of carriage will have to be made by the legislature, and the Government will doubtless, in accordance with the usual practice, before ratification either procure a bill to be passed by Parliament making the necessary changes in the law or obtain from Parliament an assurance that such a bill will be passed.

The Convention applies to all international carriage (as therein defined) by aircraft of persons, luggage, and goods for valuable consideration, including gratuitous carriage by any person engaged in the business of an air carrier. It prescribes the contents of the Passenger Ticket, the Luggage Ticket, and the Air Consignment Note.

The intention of the members of the International Air Traffic Association is that, if and when this Convention enters into force, the General Transport Conditions contained in Appendix C shall be replaced by those contained in Appendix E.

There is also a Protocole Additionel which is as follows:

*Ad Article 2*

Les Hautes Parties Contractantes se réservent le droit de déclarer au moment de la ratification ou de l'adhésion que l'article 2 alinéa premier de la présente Convention ne s'appliquera pas aux transports internationaux aériens effectués directement par l'État, ses colonies, protectorats, territoires sous mandats ou tout autre territoire sous la souveraineté, sa suzeraineté ou son autorité.

# APPENDIX E

## GENERAL CONDITIONS OF CARRIAGE OF PASSENGERS AND BAGGAGE

(Due to come into force on the same day as the Warsaw Convention)

### CHAPTER I

SCOPE—DEFINITIONS

*Article 1.—Undertakings and Carriage to which these Conditions are Applicable*

Para. 1.—These Conditions are applicable to all carriage (internal and international) of persons (passengers) and baggage performed by an air transport undertaking (carrier) which is a member of the International Air Traffic Association. Nevertheless the special provisions referred to in paragraph 2, sub-paragraph 1, of this Article are only applicable to the special categories of international carriage defined in paragraph 2, sub-paragraph 2, of this Article.

Para. 2.—(1) The provisions of Article 2 paragraph 3 sub-paragraphs 2 and 3 and paragraph 6 (second sentence), Article 9 paragraph 2 sub-paragraph 2 and paragraph 3 (second sentence), Article 12 paragraph 4 sub-paragraph 1 (third sentence), Article 19 paragraph 1 sub-paragraph 2, Article 22 paragraph 4 sub-paragraph 2 and Article 23 paragraph 1 sub-paragraph 1 are applicable only to the special categories of international carriage defined in sub-paragraph 2 of this paragraph.

(2) The special categories of international carriage referred to in sub-paragraph 1 of this paragraph include all carriage by air in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties to the Convention of Warsaw for the unification of certain rules relating to International Air Transport of October 12, 1929,

upon which these Conditions are based, or within the territory of a single High Contracting Party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is a non-contracting Power.

(3) A carriage to be performed by several successive air carriers is deemed, for the purpose of sub-paragraph 2 above, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character within the meaning of sub-paragraph 2 above merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

Para. 3.—In the case of combined carriage performed partly by air and partly by any other mode of carriage (combined transport) these Conditions apply only to the carriage by air, unless other terms have been agreed and provided such other terms comply with the provisions of paragraphs 1 or 2 above.

Para. 4.—The Carriers reserve the right to make additional Conditions for special lines or for carriage privately arranged.

## CHAPTER II

### CARRIAGE OF PASSENGERS

#### *Article 2.—Passenger Tickets*

Para. 1.—Before he begins his journey the passenger must be provided with a passenger ticket.

Para. 2.—The passenger is bound to retain his ticket throughout the journey. He must when required produce it to any official in charge and surrender it at the end of the journey.

Para. 3.—(1) The passenger ticket shall contain the following particulars:

(*a*) The place and date of issue;
(*b*) The places of departure and destination;
(*c*) The name and address of the carrier or carriers.

The passenger ticket shall contain also the name of the passenger and the amount of the fare.

(2) So far as concerns international carriage, as defined by

Article 1 paragraph 2, the passenger ticket shall contain in addition the following particulars :

(*d*) The agreed stopping places, for which summarized descriptions published by the carrier may be used :

(*e*) A statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929, upon which these Conditions are based.

(3) The carrier has the right to alter the agreed stopping places in case of necessity without any such alteration having the effect of depriving international carriage, as defined by Article 1, paragraph 2, of its international character within the meaning of this provision.

Para. 4.—(1) The passenger ticket is valid only for the date and service specified thereon and for the party named. A special aircraft can only be provided by special agreement.

(2) The passenger ticket is not transferable.

Para. 5.—Return tickets are valid only for the period specified thereon. If no period is specified they are valid for a maximum period of three months from the date of issue. They are subject to the same regulations as single tickets.

Para. 6.—The absence, irregularity or loss of the ticket does not affect the existence or the validity of the contract of carriage, which shall none the less be subject to these Conditions. If the carrier accepts a passenger for international carriage, as defined by Article 1, paragraph 2, without a ticket having been delivered the carrier shall not be entitled to avail himself of those provisions of Article 19 paragraph 1 sub-paragraph 3 and paragraph 2 sub-paragraph 1 which exclude or limit his liability.

*Article 3.—Carriage of Minors*

Para. 1.—Up to three years of age, children, when accompanied by an adult and when no separate seat is required for them, are carried at a charge equivalent to 10 per cent. of the normal rate for passengers.

Para. 2.—Children aged more than three years and less than seven years, and younger children for whom a separate seat is required, are carried at a reduced price representing one-half of the normal rate.

*Article 4.—Allocation and Distribution of Seats*

Subject to the provisions of Article 1, paragraphs 3 and 4, the allocation and distribution of seats is governed by the regulations

in force with the individual carriers, which apply both to single and return tickets.

*Article 5.—Persons excluded from Flights or accepted Conditionally*

Para. 1.—In every case the following are excluded from carriage :

(*a*) Persons under the influence of drink or drugs or other narcotics, and those who conduct themselves in an improper manner or who do not observe the instructions of any authorized official ;

(*b*) Persons of unsound mind and those afflicted with a contagious disease or who, because of illness or for any other reason, might inconvenience other passengers.

Para. 2.—The persons referred to in paragraph 1 above are not entitled to repayment of the fare paid.

*Article 6.—Articles which Passengers are Forbidden to take with them into an Aircraft*

Para. 1.—Passengers are forbidden to take with them into an aircraft :

(*a*) Articles which according to the regulations of the carrier must be carried in the baggage compartment ;

(*b*) Dangerous articles, especially arms, munitions, explosives, corrosives and articles which are easily ignited ; things which are offensive or evil-smelling, and other articles of a character likely to inconvenience passengers or which are dangerous to aircraft, passengers or goods ;

(*c*) Photographic apparatus, carrier pigeons, wireless apparatus and other articles the carriage of which by aircraft is prohibited by law or other authority.

Para. 2.—Passengers are permitted, unless prohibited by law or other authority, to take with them arms and ammunition forming part of hunting or sporting equipment on condition that the arms and ammunition are packed in such a manner as to cause no danger to persons or things. Firearms must be unloaded and dismantled as much as possible or at any rate carried in a case.

Para. 3.—The carriers' employees are authorized to verify, in the presence of the passenger, the nature of articles introduced into an aircraft.

Para. 4.—Any person contravening the provisions of paragraphs 1 and 2 of this Article is liable for all damage resulting from such contravention, and is also subject to the penalties, if any, imposed by the regulations of the carrier.

Para. 5.—The passenger is entirely responsible for the supervision of articles which he takes charge of himself. The carrier accepts no responsibility for the supervision of such articles even if his employees assist in loading, unloading or transhipping them.

*Article 7*

Para. 1.—(1) Passengers must observe the instructions of the officials of the carriers concerning all matters connected with the air service.

(2) Furthermore they must obey instructions posted in the offices and aircraft of the carrier.

Para. 2.—(1) The presence of passengers upon the area of departure or near aircraft is forbidden without the express permission of the officials of the carrier.

(2) Passengers must only enter or leave aircraft at the request of such officials. Passengers are forbidden to open exterior doors during flight; when the aircraft is on the ground passengers are only permitted to open these doors in case of danger. It is also forbidden to throw articles from aircraft.

Para. 3.—Smoking and lighting matches in aircraft is prohibited unless and except as provided by regulations to the contrary posted therein.

Para. 4.—Any person contravening these regulations is responsible for all damage resulting from such contravention. He may be excluded from carriage, and in this event he shall not be entitled to repayment of the fare paid.

## CHAPTER III

### CARRIAGE OF BAGGAGE

*Article 8.—Articles Excluded from Carriage*

Para. 1.—The following are excluded from carriage as baggage:

(*a*) The articles enumerated in Article 6 paragraph 1 (*b*) and (*c*) in so far as exceptions are not permitted under the provisions of paragraph 3 of this Article;

(*b*) Articles which, owing to their dimensions, their weight or their character, are in the opinion of the carrier unsuitable for carriage in the aircraft of any of the carriers concerned ;

(*c*) Goods (merchandize).

Para. 2.—Live animals can only be carried by special arrangement.

Para. 3.—Arms can only be carried as baggage in exceptional cases. In such cases they must be packed in such a manner as to cause no danger to any one ; firearms must be unloaded and dismantled as much as possible. In so far as photographic apparatus, carrier pigeons and wireless apparatus are accepted as baggage, they must be packed in such a way as to prevent their being used during flight.

Para. 4.—Baggage will be carried when possible in the same aircraft as the passenger, if the load of the aircraft permits, without the carrier being under any obligation in this respect.

*Article* 9.—*Registration. Baggage Check*

Para. 1.—(1) When baggage is registered the carrier will furnish a baggage check.

(2) One copy of this check will be delivered to the passenger and another will be retained by the carrier.

Para. 2.—(1) The baggage check shall contain the following particulars :

(*a*) The number of the passenger ticket (or the number of the ticket folder when this contains more than a single passenger ticket) ;

(*b*) The number and weight of the packages ;

(*c*) The name and address of the carrier or carriers ;

(*d*) The places of departure and of destination ;

(*e*) Where required, the amount of the sum representing the declared value at delivery in conformity with Article 19 paragraph 2 sub-paragraph 2 ;

(*f*) Where required, the amount of the value specially declared for insurance by the carrier in conformity with Article 14 paragraph 2 ;

(*g*) The place and date of issue ;

(*h*) A statement that delivery of the baggage will be made to the bearer of the baggage check.

(2) So far as concerns international carriage, as defined by

Article 1 paragraph 2, the baggage check shall contain in addition :

(*i*) A statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929, upon which these Conditions are based.

Para. 3.—The absence, irregularity or loss of the baggage check does not affect the existence or the validity of the contract of carriage which shall none the less be subject to these Conditions. If the carrier accepts baggage for international carriage, as defined by Article 1 paragraph 2, without a baggage check having been delivered, or if, under similar circumstances, this does not contain all the particulars set out in paragraph 2 (*a*), (*b*) and (*i*), the carrier shall not be entitled to avail himself of those provisions of Article 19 paragraph 1 sub-paragraph 3 and paragraph 2 sub-paragraph 2 which exclude or limit his liability.

*Article* 10.—*Liability of the Passenger concerning his Baggage*

Para. 1.—The bearer of the baggage check must observe the provisions of Article 8. He is responsible for all the consequences of non-observance of these provisions.

Para. 2.—If any contravention is suspected, the carrier has the right to verify if the contents of packages comply with the regulations. The bearer of the baggage check will be called to assist at such verification. If he does not attend or if he cannot be found, verification can be effected by officials of the carrier alone. If a contravention is proved, the cost of verification must be paid by the bearer of the baggage check.

Para. 3.—In the case of a breach of the conditions of Article 8, the bearer of the baggage check shall pay an extra charge (surtaxe) without prejudice to the supplementary charge (supplément de taxe) and compensation for damage ; also penalties, if required.

*Article* 11.—*Packing and Condition of Baggage*

Para. 1.—Baggage unsatisfactorily packed or defective in condition may be refused, but if it is accepted the carrier shall have the right to specify its condition on the baggage check.

Para. 2.—The carrier may require that packages shall bear in Latin characters on durable labels the name and address of the passenger and the airport of destination.

Para. 3.—The carrier may require that old labels, addresses, or other particulars concerning former journeys shall be removed by the passenger. The carrier has the right to remove them himself.

*Article 12.—Delivery*

Para. 1.—Delivery of baggage will be made to the bearer of the baggage check against delivery of the baggage check. The carrier is not bound to verify if the bearer of the check is entitled to take delivery.

Para. 2.—Failing presentation of the baggage check, the carrier is only bound to deliver the baggage if the claimant establishes his right; if such right appears to be insufficiently established the carrier may require security.

Para. 3.—Baggage will be delivered at the place of destination to which it is registered. Nevertheless, at the request of the bearer of the baggage check, if made in sufficient time and if circumstances permit, baggage can be delivered at the place of departure or at a stopping place against delivery of the baggage check (without any liability to refund the cost of carriage paid) provided this is not precluded by regulations of the Customs, Revenue (octroi), Fiscal, Police or other administrative authorities.

Para. 4.—(1) The receipt without complaint of baggage by the bearer of the baggage check or other party entitled is *primâ facie* evidence that the baggage has been delivered in good condition and in accordance with the contract of carriage. In case of damage the passenger must complain to the carrier forthwith after discovery of the damage, and at the latest within three days from the date of receipt of the baggage. So far as concerns international carriage within the meaning of Article 1 paragraph 2, in case of delay the complaint must be made at the latest within fourteen days from the date on which the baggage has been placed at his disposal. Every complaint must be made in writing upon the baggage check or by separate notice in writing despatched within the times aforesaid. Failing complaint within the times aforesaid no action shall lie against the carrier save in the case of fraud on his part.

(2) The expression "days" when used in these Conditions means current days, not working days.

## CHAPTER IV

### PROVISIONS APPLICABLE TO THE CARRIAGE OF BOTH PASSENGERS AND BAGGAGE

*Article 13.—Conclusion of the Contract of Carriage*

Para. 1.—Except as provided by Article 2 paragraph 6 and Article 9 paragraph 3, the contract of carriage is made effective immediately on acceptance by the passenger of the passenger ticket, and, so far as concerns the carriage of baggage, the baggage check.

Para. 2.—The carrier reserves the right to refuse to enter into a contract of carriage without giving any reason.

Para. 3.—If there is any question of an aircraft being overloaded the parties authorized by the carrier to supervise the loading of aircraft shall decide which persons or articles shall be carried.

Para. 4.—In the event of a passenger or any baggage being excluded from a flight under the provisions of paragraph 3 above the passenger has the right only to repayment of the total sum paid by him for the carriage.

*Article 14.—Basis of Calculation of Charges for Carriage. Tariffs. Insurance*

Para. 1.—The charges for carriage are calculated according to the published tariffs.

Para. 2.—The carriers offer facilities to passengers for the insurance of themselves against accident under special conditions and at special rates; they also offer facilities for the insurance of their baggage under special conditions and at special rates.

*Article 15.—Formalties required by Customs, Revenue (octroi), Fiscal, Police and other Administrative Authorities*

Para. 1.—The passenger must observe the regulations prescribed by the Customs, Revenue (octroi), Fiscal, Police and other administrative authorities concerning himself, his registered baggage and his hand luggage. He must attend the inspection of his registered baggage and of his hand luggage if required. The carrier accepts no responsibility towards the passenger in the event of the latter failing to observe these regulations. In the event of a passenger causing damage to a carrier by non-observance of these regulations the passenger must compensate the carrier.

Para. 2.—The passenger must attend at the airport or elsewhere as prescribed by the carrier sufficiently in advance of the time of departure to enable the formalities mentioned in paragraph 1 above to be complied with before departure. If the carrier has specified a certain time for this purpose the passenger must arrive at or before such time.

*Article 16.—Refunds*

Para. 1.—No claim for refund of the fare paid for carriage can be entertained when a traveller does not arrive or arrives late for a journey for which a reservation has been made.

Para. 2.—If a flight is cancelled owing to meteorological conditions or for any other reason, or if the aircraft returns to the airport of departure with the passenger, the latter shall be entitled to the return of the fare paid for the carriage of himself and his baggage.

Para. 3.—In the event of a flight being interrupted the passenger is entitled to the return of a proportion of the fare paid for himself and his baggage corresponding with the non-flown mileage, unless the carrier completes the carriage by other means or makes himself responsible for the cost of forwarding by another means of transport. In such event he shall only be liable to refund the difference in fare, if any.

Para. 4.—All rights to refund are extinguished unless a claim is made within a period of three weeks from the date fixed for the journey.

*Article 17.—Disputes*

Disputes between passengers and carriers' employees are provisionally settled at airports by the official in charge, and in the course of flight by the commander of the aircraft or by the person specially designated by the carrier.

## CHAPTER V

### LIABILITY OF CARRIERS. ACTIONS

*Article 18.—General Provisions. Periods of Liability*

Para. 1.—In the case of carriage to be performed by various successive carriers, each carrier who accepts passengers or baggage is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

Para. 2.—The liability of carriers under the provisions of Article 19 paragraph 1 sub-paragraph 1 (*a*) applies to accidents occurring on board the aircraft or in the course of any of the operations of embarking or disembarking.

Para. 3.—The liability of carriers under the provisions of Article 19 paragraph 1 sub-paragraph 1 (*b*) covers the period during which the baggage is in charge of the carrier, whether in an airport or on board an aircraft or, in the case of a landing outside an airport, in any place whatsoever. It does not extend to any carriage by land, by sea or by river performed outside an airport. Nevertheless, if such a carriage as last aforesaid takes place in the performance of a contract for carriage by air, for the purpose of loading, delivery or transhipment, any damage is presumed, subject to proof to the contrary, to have been the result of an occurrence which took place during the carriage by air.

Para. 4.—The liability of carriers under the provisions of Article 19 paragraph 1 sub-paragraph 2 covers the period of carriage by air.

Para. 5.—Passengers and baggage are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorized agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the passenger renounces for himself and his representatives all claims for compensation for damage in connection with the carriage, caused directly or indirectly to passengers or their belongings, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based.

*Article* 19.—*Extent of Liability*

Para. 1.—(1) Within the limits prescribed by Article 18 carriers are liable for damage sustained during the period of the carriage as defined in Article 18 paragraphs 2 and 3 :

(*a*) In the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger ;

(*b*) In the event of destruction or loss of or damage to registered baggage.

(2) So far as concerns international carriage, as defined by Article 1 paragraph 2, the carriers are likewise liable, within the same limits, for damage sustained during the period of the carriage as defined by Article 18 paragraph 4 in case of delay of passengers and baggage.

The time-tables of carriers furnish indications of average times without these being in any way guaranteed. The carrier reserves the right to decide if the meteorological and other conditions for the normal performance of a flight are suitable, if especially the times of departure and arrival should be modified and if a departure or landing should not be made at all at any particular time or place. In addition the carrier reserves the right to arrange at landing places such periods of stoppage as may be necessary to ensure connections, the maximum duration of which periods of stoppage will be mentioned in the time-tables ; no responsibility concerning the making of connections can be accepted.

(3) Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage, or that it was impossible for them to take such measures. In the carriage of baggage the carriers are not liable if they prove that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, and that, in all other respects, they and their agents have taken all necessary measures to avoid the damage.

(4) If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Para. 2.—(1) In the carriage of passengers the liability of carriers for each passenger is limited to the sum of 125,000 francs unless a larger sum has been agreed upon. Where, in accordance with the law of the court seised of the case, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs.

(2) In the carriage of registered baggage the liability of carriers is limited to the sum of 250 francs per kilogram, unless the passenger has made, at the time when the baggage was handed over to the carrier, a special declaration of the value at delivery and has paid such supplementary charge as is required. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the passenger at delivery.

(3) As regards articles of which the passenger takes charge himself, the liability of the carrier is limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be taken to refer to the French franc consisting of sixty-five and a half milligrams gold of millesimal fineness.

*Article 20.—Claims*

Para. 1.—Claims must be addressed in writing to the carriers referred to in Article 22.

Para. 2.—The right to make a claim belongs to the parties who have the right to bring an action against the carriers under the provisions of Article 21.

Para. 3.—(1) The originals or duly authenticated copies of tickets, baggage checks and other documents which the party entitled deems it advisable to attach to his claim must be produced.

(2) When a claim is settled the carrier can require the return to him of the tickets and baggage checks.

*Article 21.—Persons who are Entitled to bring Actions*

Only the party who produces the ticket or baggage check as the case may be, or who in default of production establishes his right, is entitled to bring an action arising out of the contract of carriage against the carrier.

*Article 22.—Undertakings against which Action can be Taken. Jurisdiction*

Para. 1.—An action for the return of a sum paid under the provisions of a contract of carriage can only be brought against the undertaking which received the sum.

Para. 2.—In the case of the carriage of passengers, the passenger or his representatives can take action only against the carrier who performed the carriage during which the event giving rise to the action occurred, save in the case where, by express agreement in writing, the first carrier has assumed liability for the whole journey.

Para. 3.—In the case of the carriage of baggage, except so far as concerns actions under the provisions of paragraph 1 above, the party entitled will have a right of action against the first or the last carrier, and in addition, so far as concerns actions

arising under Article 19, against the carrier who performed the carriage during which the event giving rise to the action took place. For actions arising under the provisions of Article 19 these carriers will be jointly and severally responsible to the party entitled.

Para. 4.—(1) Actions must be brought before the court of the carrier's principal place of business. The national law of the court seised of the case shall apply.

(2) Nevertheless actions arising under the provisions of Article 19, in connection with Article 1 paragraph 2, must be brought, at the option of the plaintiff, in the territory of a State which is a contracting party to the Convention of Warsaw, either

(*a*) before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made; or

(*b*) before the court having jurisdiction at the place of destination.

(3) Questions of procedure shall be governed by the law of the court seised of the case.

*Article 23.—Limitation of Actions*

Para. 1.—(1) The right to damages arising under the provisions of Article 19, in connection with Article 1 paragraph 2, shall be extinguished if an action is not brought within two years, which may be reckoned either from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.

(2) All other rights to damages arising out of the contract of carriage shall be extinguished if an action is not brought within a period of six months.

Para. 2.—The method of calculating the period of limitation, as well as the grounds for suspension or interruption of the period of limitation, shall be determined by the law of the court seised of the case.

*Article 24.—Legislative Provisions*

Where in any country legislative provisions conflict with these Conditions of Carriage, the latter shall be applicable only in so far as they do not conflict with such legislative provisions.

# GENERAL CONDITIONS OF CARRIAGE OF GOODS

(Due to come into force on the same day as the Warsaw Convention)

## CHAPTER I

### SCOPE—DEFINITIONS

*Article 1.—Transport Undertakings and Consignments to which these Conditions are Applicable*

Para. 1.—These Conditions are applicable to all carriage (internal and international) of goods performed by an air transport undertaking (carrier) which is a member of the International Air Traffic Association. Nevertheless the special provisions referred to in paragraph 2 sub-paragraph 1 of this Article are only applicable to the special categories of international carriage defined in paragraph 2 sub-paragraph 2 of this Article.

Para. 2.—(1) The provisions of Article 4 paragraph 4 sub-paragraph 5, Article 7 paragraph 3 (second sentence), Article 8 paragraph 4 sub-paragraph 4, Article 13 paragraph 4 sub-paragraph 1 (third sentence), Article 20 paragraph 1 sub-paragraph 2, Article 22 paragraph 4 sub-paragraph 2, and Article 23 paragraph 1 sub-paragraph 1 are applicable only to the special categories of international carriage defined in sub-paragraph 2 of this paragraph.

(2) The special categories of international carriage referred to in sub-paragraph 1 of this paragraph include all carriage by air in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the carriage or a transhipment, are situated either within the territories of two High Contracting Parties to the Convention of Warsaw for the unification of certain rules relating to International Air Transport of October 12, 1929, upon which these Conditions are based, or within the territory of a Single Contracting Party if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another Power, even though that Power is a non-contracting Power.

(3) A carriage to be performed by several successive air carriers is deemed, for the purpose of sub-paragraph 2 above, to be one undivided carriage, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it does not lose its international character within the meaning of sub-paragraph 2 above merely because one contract or a series of contracts is to

be performed entirely within a territory subject to the sovereignty, suzerainty, mandate or authority of the same High Contracting Party.

Para. 3.—In the case of combined carriage performed partly by air and partly by any other mode of carriage (combined transport) these Conditions apply only to the carriage by air, unless other terms have been agreed and provided such other terms comply with the provisions of paragraphs 1 or 2 above.

Para. 4.—These Conditions are not applicable to the carriage of articles controlled by the Postal Administrations of any of the territories to be traversed.

Para. 5.—The carriers reserve the right to publish additional conditions for special lines or for carriage privately arranged.

*Article 2.—Articles Excluded from Carriage*

Para. 1.—The following are excluded from carriage :

(1) Articles which owing to their dimensions, their weight or their character are in the opinion of the carriers unsuitable for carriage, either in the aircraft itself or in any other means of transport connected with the carriage of any of the carriers concerned, or which are unsuited to any accommodation involved ;

(2) Articles the importation, exportation, or carriage of which is prohibited by the laws or regulations of any of the States the territory of which is to be crossed ;

(3) Dangerous articles, especially arms, munitions, explosives, corrosives and articles which are easily ignited ; things which are offensive or evil-smelling or other articles of a character likely to inconvenience passengers or which are dangerous to aircraft, passengers or goods.

Para. 2.—The responsibility for the non-observance of these provisions and all consequences of such non-observance rests entirely with the consignor.

*Article 3.—Articles Accepted for Carriage Subject to Certain Conditions*

The following are accepted for carriage only subject to the conditions which appear below :

(1) Live animals can only be carried by special arrangement with the first carrier.

(2) Gold, platinum, and all articles the value of which exceeds 1500 French francs per kilogram only under the following conditions :

(*a*) The articles must be well and strongly packed and furnished with a substantial fastening ;

(*b*) Their value must be inserted in the air consignment note under the heading " Quantity and Nature of Goods."

## CHAPTER II

### CONTRACT OF CARRIAGE

*Article 4.—Scope and Form of the Air Consignment Note*

Para. 1.—(1) The consignor must make out an air consignment note in three original parts, according to the form prescribed by the carrier, and hand them over with the goods. The first part is marked " For the Carrier " ; it shall be signed by the consignor. The second part is marked " For the Consignee " ; it shall be signed by the consignor and by the carrier or their respective agents, and shall accompany the goods. The third part is marked " For the Consignor " ; it shall be signed by the carrier or his agent and be handed by him to the consignor after the goods have been accepted by the carrier. The carrier shall sign on acceptance of the goods. The carrier may sign by means of a stamp ; the signature of the consignor may be in print or by stamp.

(2) Nevertheless carriers reserve the right to require extra copies of the air consignment note from the consignor.

(3) Carriers have the right to require the consignor to make out separate air consignment notes when there is more than one package.

(4) It is forbidden to include in the same air consignment note articles which cannot be loaded together without inconvenience and without breach of any regulations of the Customs, Revenue (octroi), Fiscal, Police and other Administrative Authorities.

Para. 2.—(1) The form of the air consignment note must be printed in one of the official languages of the country of departure, and also in one of the following languages, namely, English, French or German. It may include also every translation into other languages which is deemed advisable.

(2) The portions of the Consignment Note to be completed by the consignor must be filled up in one of the official languages of the country of departure in so far as no special descriptions have been allowed for by the carrier. The first carrier has the right to decide whether a translation must be added and which.

Para. 3.—Air consignment notes the writing on which is interlined or erased are not accepted. Alterations are permitted only on condition that the consignor signifies his approval of them by his initials, and that he inscribes in words the altered quantities and values when the alteration concerns the number, weight or value of packages or other particulars given in figures.

Para. 4.—(1) The particulars inscribed on the air consignment note must be written or printed in indelible characters.

(2) The air consignment note must contain in Latin characters the following particulars inserted by the consignor :

(*a*) The place and date where and when the document was completed ;

(*b*) The place of departure and of destination ;

(*c*) The name and address of the consignor and of the consignee ;

(*d*) The number of packages, the method of packing, and the particular marks or numbers upon the packages ;

(*e*) The nature of the goods, the weight, the quantity, and the volume or dimensions of the goods ; also, where articles referred to in Article 3 sub-paragraph 2 above are concerned, the value of such articles, which must be inserted under the heading " Quantity and Nature of Goods " ;

(*f*) The party who is liable for payment of the freight and of the Customs and all other charges ;

(*g*) If goods are sent for payment on delivery, the price of the goods, and, if necessary, the amount of the expenses incurred, the whole in one single sum ; the amount payable on delivery must not exceed the last-mentioned sum ; it must be expressed in the currency of the country of departure except in so far as exceptions are provided for in the tariff ; conversion must be effected at the rates of exchange published by the carriers ; failing such published rates conversion will be effected at the official rates of exchange ;

(*h*) Where required, the amount of the sum representing the declared value at delivery in conformity with Article 20 paragraph 2 sub-paragraph 1.

(*i*) Where required, the amount of the value specially declared for insurance by the carrier in conformity with Article 8 paragraph 3 ;

(*j*) The number of parts of the air consignment note ;

(*k*) A detailed list of the documents handed to the carrier to accompany the air consignment note required by the Customs, Revenue (octroi), Fiscal, Police and other administrative authorities, and of all other documents ;

(*l*) The time fixed for completion of the carriage and a summary of the route to be followed (this latter being inscribed under the heading " Route ") if a fixed time for completion of the carriage or the route to be followed have been specially agreed ;

(*m*) The value for Customs purposes in so far as this is obligatory for any country concerned.

The particulars required under (*g*), (*h*), and (*i*) must be written in words and figures.

(3) The carrier can also require that the apparent condition of the goods, and of the packing, shall be inserted by the consignor. In default of the consignor inserting these particulars the carrier may insert them himself. In the event of the apparent condition of the goods, the packing or the nature of the goods not corresponding, either at the time of acceptance or in the course of carriage, with the particulars inscribed in the air consignment note, the carriers may notify the fact on the air consignment note.

(4) The air consignment note must contain also the following particulars inserted by the carrier :

(*a*) The name and address of the first carrier who accepts the consignment for carriage ;

(*b*) The freight agreed and the incidental expenses, as well as the date and place of payment.

(5) So far as concerns international carriage, as defined by Article 1 paragraph 2, the air consignment note shall contain in addition the following particulars inserted by the carrier :

(*a*) The agreed stopping places, for which summarized descriptions published by the carrier may be used ;

(*b*) A statement that the carriage is subject to the rules relating to liability set out in the Convention of Warsaw of October 12, 1929, upon which these Conditions are based.

Para. 5.—(1) If at the request of the consignor the carrier makes out the air consignment note, he shall be deemed, in default

of proof to the contrary, to have acted for and on behalf of the consignor.

(2) If the air consignment note handed over with the goods does not contain all the required particulars, the carrier is entitled to complete it to the best of his ability, but without being under any obligation to do so.

*Article 5.—Liability Arising out of the Particulars Inserted in the Air Consignment Note*

(1) The consignor is responsible for the correctness and completeness of the particulars and statements which he inserts in the air consignment note.

(2) The consignor will be liable for all damage suffered by the carrier or any other person by reason of the irregularity, incorrectness, or incompleteness of the said particulars and statements, or by reason of their being inserted otherwise than in the appropriate places reserved for them.

(3) When the carrier makes out or completes the air consignment note on behalf of the consignor under the provisions of Article 4 paragraph 5, the consignor shall be liable for all the consequences which may result, without being entitled to any recourse whatsoever against the carrier for any damage which may arise therefrom.

*Article 6.—Right of Refusal*

Carriers reserve the right to refuse to enter into any contract of carriage without giving a reason.

*Article 7.—Conclusion of the Contract of Carriage*

Para. 1.—(1) The contract of carriage is made effective, without prejudice to the provisions of paragraph 3 of this Article, when a carrier has accepted goods for carriage with the air consignment note.

(2) The carrier signifies acceptance by signing the air consignment note or impressing his stamp upon it.

Para. 2.—The air consignment note so completed is *primâ facie* evidence of the conclusion of the contract, of the receipt of the goods and of the Conditions of carriage. The statements in the air consignment note relating to the weight, dimensions and packing of the goods, as well as those relating to the number of packages, are *primâ facie* evidence of the facts stated ; those relating to the quantity, volume and condition of the goods do

not constitute evidence against the carriers, except so far as they both have been and are stated in the air consignment note to have been checked by them in the presence of the consignor, or relate to the apparent condition of the goods.

Para. 3.—The absence, irregularity, or loss of the air consignment note does not affect the existence or validity of the contract of carriage, which shall none the less be subject to these Conditions. If the carrier accepts goods for international carriage, as defined by Article 1 paragraph 2, without an air consignment note having been made out, or if the consignment note for such carriage does not contain all the particulars set out in Article 4 paragraph 4 sub-paragraph 2 (*a*) to (*f*) and sub-paragraphs 4 and 5, the carrier shall not be entitled to avail himself of those provisions of Article 20 paragraph 1 sub-paragraphs 1 and 3 and paragraph 2 sub-paragraph 1 which exclude or limit his liability. This provision does not apply to the regulations prescribed by Article 4 paragraph 4 sub-paragraph 2 (*e*) and (*f*) so far as concerns particulars of value and Customs and other charges except freight.

*Article 8.—Tariffs, Insurance, Routes, and Method of Carriage*

Para. 1.—The charges for carriage and incidental expenses are calculated in accordance with the published tariffs.

Para. 2.—In addition to the charges for carriage and various incidental expenses provided for by the tariffs, carriers only charge for their own reimbursement sums they actually expend, such as import and export dues, costs of haulage (camionnage), cost of repairs, to packing of goods necessary to safeguard their preservation, and other similar expenses.

Para. 3.—Carriers offer their clients facilities for the insurance of goods at the expense of the consignor under special conditions and at special rates. If the consignor wishes to insure the goods in this way he must insert the sum to be insured under the heading " Special Declaration of Value for Insurance by the Carrier " in the air consignment note. If the consignor does not complete the air consignment note, the first carrier will at the request of the consignor insert the necessary particulars.

Para. 4.—(1) Goods will be despatched according to the instructions of the consignor contained in the air consignment note. Carriers do not, however (in default of express agreement), undertake any responsibility for carriage by any particular transport company, service or route or by any particular aircraft.

(2) Furthermore despatch is only undertaken by means of aircraft normally employed. A special aircraft can only be demanded if an express agreement to this effect has been entered into.

(3) If there is any question of an aircraft being overloaded the parties authorized to supervise the loading of aircraft shall decide which articles shall be carried.

(4) In case of necessity the carrier who accepts goods for carriage has the right to alter the route, even if this has been specially agreed, and the agreed stopping places, without any such alteration having the effect of depriving the carriage of its international character within the meaning of Article 1 paragraph 2.

(5) In the case of a forced landing, or if for any other reason the carrier cannot despatch or carry a consignment in accordance with the presumed intentions of the consignor, he shall be entitled to hand over the consignment for despatch to another transport undertaking. If carriers are in doubt as to the intentions of the consignor they are entitled to ask for the instructions of the latter by telephone, telegraph or otherwise through the airport of departure. Any expense so incurred attaches to the goods.

### *Article 9.—Time for Delivery*

Carriers do not guarantee the carriage or delivery of goods within a definite time except by special agreement incorporated in the air consignment note under the provisions of Article 4 paragraph 4 sub-paragraph 2 (*l*).

### *Article 10.—Condition of Goods and Packing*

Para. 1.—Goods must be packed in such a way that they cannot, before arrival at destination, deteriorate or cause other goods to deteriorate.

Para. 2.—All goods must be furnished with a durable inscription, written legibly in Latin characters, firmly attached and giving the names of the consignor and consignee, the name of the airport of destination, and the instructions " Delivery to Domicile " or " For Collection by Consignee."

Para. 3.—C.O.D. consignments must be distinguished by a red label, in accordance with the form prescribed by the carrier, bearing the letters " C.O.D."

*Article 11.—Documents Annexed and Customs Seals*

Para. 1.—The consignor must furnish such information and attach to the air consignment note such documents as are necessary to meet the formalities of Customs, Revenue (octroi), Fiscal, Police and other administrative authorities before the goods can be delivered to the consignee. The provisions of Article 5 sub-paragraph 2 shall apply if need be.

Para. 2.—The carrier is under no obligation to inquire into the correctness or sufficiency of such information or documents.

Para. 3.—The consignor is bound to observe the Customs regulations concerning the packing of goods. Goods which are required to be delivered under Customs seal cannot be accepted when the seal is damaged or missing.

*Article 12.—Formalities required by Customs, Revenue (octroi), Fiscal, Police and other Administrative Authorities*

Para. 1.—The formalities required by Customs, Revenue (octroi), Fiscal, Police and other administrative authorities must be complied with, before delivery for carriage by the consignor, *en route* by the carrier and at the place of destination by the consignee. The carrier also is entitled to comply with these formalities at the place of destination for and on behalf of the consignee or of the consignor, unless instructions to the contrary have been given by these parties. In such a case the carrier assumes the character of an agent. The carrier may also entrust the completion of these formalities to an agent.

Para. 2.—The consignor may, so far as permitted by regulations of the Customs authorities, require that imported goods shall be delivered for compliance with Customs formalities, either during the course of the journey at one of the airports which is an agreed stopping place, or at the Customs office of the airport of destination. Nevertheless the carriers are entitled to disregard such instructions if it appears to be necessary.

Para. 3.—The consignor is not entitled to give other instructions concerning the place where Customs formalities, etc., are to be complied with.

*Article 13.—Delivery*

Para. 1.—(1) The carrier is obliged, upon arrival of the goods at the place of destination, to deliver the air consignment note and the goods to the consignee against a receipt, subject to the payment of all sums due and to compliance with the other

conditions of carriage. If re-forwarding of packages, after the termination of the air carriage, has to be performed by some other means of carriage, the consignor must indicate on the air consignment note the name and address of the party or agent to whom the goods must be handed for re-forwarding. The carriers undertake upon request the delivery of consignments to other means of transport. They reserve the right to employ a shipping or forwarding agent.

(2) In cases where no shipping or forwarding agent has been indicated, the one with whom the air carrier has made arrangements for re-forwarding shall be deemed to be the one chosen by the consignor.

Para. 2.—(1) After arrival of the goods, in default of any special arrangement made by the consignor or the consignee, the carrier is bound to notify the consignee in the manner which he considers is most appropriate.

(2) The carrier is bound to make delivery to the domicile of the consignee, against payment of the expenses involved, if this method of delivery is prescribed by the consignor or desired by the consignee ; otherwise, or if there is no organized service of delivery to domicile at the place of destination, the consignee must collect and accept delivery of goods at the airport of destination or other place indicated by the carrier.

Para. 3.—If delivery of the consignment is delayed by circumstances for which the carrier is not responsible, the latter is entitled to make charges for storage.

Para. 4.—(1) Receipt by the consignee of goods without complaint is *primâ facie* evidence that the same have been delivered in good condition and in accordance with the air consignment note. In the case of damage the consignee must complain to the carrier forthwith after discovery of the damage and at the latest within seven days from the date of receipt of the goods. So far as concerns international carriage, within the meaning of Article 1 paragraph 2, in case of delay the complaint must be made at the latest within fourteen days from the date on which the goods should have been placed at his disposal. Every complaint must be made in writing upon the air consignment note or by separate notice in writing despatched within the times aforesaid. Failing complaint within the times aforesaid no action shall lie against the carrier, save in the case of fraud on his part.

(2) The expression " days " when used in these conditions means current days not working days.

*Article 14.—Payment of Charges for Carriage*

Para. 1.—The consignor may undertake the payment wholly or partially of, or make the consignee liable for, the charges for carriage, the customs charges, the incidental expenses, the disbursements, and the charges of haulage (camionnage). The charges undertaken by the consignor must be inserted in the air consignment note in the appropriate place. All charges which are not assumed by the consignor are considered to be a liability of the consignee.

Para. 2.—The carriers reserve the right to demand from the consignor the payment of all charges, incidental expenses and disbursements before despatch.

Para. 3.—If the expenses cannot be determined exactly at the time when goods are handed over for carriage, the carrier may demand by way of guarantee the deposit of a sum representing approximately the various expenses. An exact account will be furnished when the airport of destination has communicated to the place of departure the exact amount of the expenses.

*Article 15.—Discrepancies in the Payment of Tariff Charges*

The payment to the carrier of the difference between a sum actually paid and the sum which should have been paid is a matter for the consignor to settle if the consignment has not been accepted by the consignee. When the consignment has been accepted by the consignee the consignor is not liable for the payment of any difference between the amount actually paid and the amount which should have been paid beyond the amount (if any) for which he is liable under the provisions of an arrangement for repayment made by him and referred to in the air consignment note; beyond such an amount any difference is a matter for the consignee to settle.

*Article 16.—Consignor's Right of Disposition*

Para. 1.—(1) The consignor has the right to dispose of the goods either:

(*a*) By withdrawing them at the airport of departure or of destination; or

(*b*) By stopping them in the course of the journey on any landing; or

(*c*) By calling for them to be delivered at the place of destination or in the course of the journey to a person other than the consignee named in the air consignment note; or

(*d*) By requiring them to be returned to the airport of departure ; Provided that this right of disposition shall not be exercised in such a way as to prejudice the carrier or other consignors.

(2) In addition to the obligations resulting for him out of the contract of carriage the consignor must repay any expenses occasioned by the exercise of his right of disposition.

Para. 2.—Every exercise of the right of disposition must be made through the party who booked the goods for carriage and must be applicable to the whole consignment. The carrier is entitled to require that instructions as to disposition shall be given by means of a special form prescribed by him.

Para. 3.—The right of disposition over the goods can only be exercised if the consignor produces the part of the air consignment note which was delivered to him. Instructions as to disposition must also be written on this document which will be returned to the consignor.

Para. 4.—If a carrier obeys the orders of the consignor for disposition of the goods without requiring production of the part of the air consignment note delivered to the latter, he will be liable, without prejudice to his right of recovery against the consignor, for any damage which may be caused thereby to any person who is lawfully in possession of that part of the air consignment note.

Para. 5.—If it is impossible to carry out the orders of the consignor, the carrier must so inform him forthwith by telephone or telegraph or otherwise through the airport of departure. The cost of so doing attaches to the goods.

Para. 6.—The right of disposition conferred on the consignor ceases, even if he retains the copy of the consignment note which was handed to him, as soon as the air consignment note has been handed to the consignee or the latter has exercised his rights under Article 13, paragraph 1, or Article 17, paragraph 6. Nevertheless, if the consignee declines to accept the air consignment note or the goods, or if he cannot be communicated with, the consignor resumes his right of disposition.

Para. 7.—Except in cases where the consignor decides otherwise, the carrier may, in the case of goods returned, adopt the route agreed and indicated for the original journey.

*Article 17.—Impediments to Delivery*

Para. 1.—When impediments occur in connection with the delivery of goods, the last carrier should without delay notify the consignor by telephone or telegraph or otherwise through the airport of departure and ask for instructions. The expense of such notification shall attach to the goods.

Para. 2.—In case of prevention of delivery of the consignment for any reason whatsoever (other than the fault of the carrier) the consignor is liable for all the expenses involved, or which ultimately result, including if necessary the cost of returning the consignment. Where perishable goods are concerned, or in case of impossibility of return, the carriers or their representatives are entitled to sell the consignment by auction, in order to reimburse costs incurred and not provided for, in accordance with the laws and regulations to which the carrier responsible for delivery is subject.

Para. 3.—The carrier who has the consignment in his charge is entitled to recover the expenses of storage, for the duration of such storage, when the impediment to delivery does not arise through his fault.

Para. 4.—If the consignor is notified in accordance with the provisions of paragraph 1 above, and does not make immediate arrangements, the goods may at his risk and cost be stored with a shipping or forwarding agent or in a depository in accordance with the laws and regulations in force locally.

Para. 5.—If on the sale of undelivered goods the proceeds are insufficient to cover the freight charges, expenses, and other disbursements, the party who has the right of disposition over the goods is liable for the payment of any balance.

Para. 6.—If the carrier admits the loss of the goods, or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage.

*Article 18.—Carriers Right of Lien*

Para. 1.—Carriers have the rights of a creditor secured by lien over the goods for all sums due under the provisions of the contract of carriage. These rights remain as long as the goods are in the possession of a carrier or of a third party who retains them on his behalf.

Para. 2.—The effect of the right of lien is governed by the provisions of the laws of the State where the right of lien is exercised.

## CHAPTER III

### LIABILITY OF CARRIERS—ACTIONS

*Article 19.—General Provisions. Periods of Liability*

Para. 1.—In the case of carriage to be performed by various successive carriers, each carrier who accepts goods is deemed to be one of the contracting parties to the contract of carriage in so far as the contract deals with that part of the carriage which is performed under his supervision.

Para. 2.—The liability of the carriers under the provisions of Article 20 paragraph 1 sub-paragraph 1 continues during such time as the goods are in charge of the carrier whether in an airport or on board an aircraft or, in the case of a landing outside an airport, in any place whatsoever. It does not extend to any carriage by land, by sea or by river performed outside an airport. If however such carriage as last aforesaid takes place in the performance of a contract for carriage by air for the purposes of loading, transhipment or delivery any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.

Para. 3.—The liability of carriers under the provisions of Article 20 paragraph 1 sub-paragraph 2 covers the period of carriage by air.

Para. 4.—Goods are accepted for carriage only upon condition that, except in so far as liability is expressly provided for in these Conditions of Carriage, no liability whatsoever is accepted by the carriers, or their employees, or parties or undertakings employed by them in connection with their obligations, or their authorized agents, and upon condition that (except in so far as liability is expressly provided for in these Conditions) the consignor renounces for himself and his representatives all claims for compensation for damage in connection with the carriage caused directly or indirectly to goods, or to persons who, except for this provision, might have been entitled to make a claim, and especially in connection with surface transport at departure and destination, whatever may be the legal grounds upon which any claim concerning any such liability may be based.

*Article 20.—Extent of Liability*

Para. 1.—(1) Within the limits provided by Article 19 paragraph 1, the carriers are liable for all damage arising during the period of the carriage as defined in Article 19 paragraph 2, in the event of destruction or loss of or damage to goods.

(2) So far as concerns international carriage, as defined by Article 1 paragraph 2, the carriers are likewise liable, within the same limits, for damage sustained during the period of the carriage, as defined by Article 19 paragraph 3, in case of delay of goods.

The time-tables of the carriers furnish indications of average times without being in any way guaranteed. The carrier reserves the right to decide if the meteorological and other conditions for the normal performance of flights are suitable, if especially the times of departure and arrival should be modified and if a departure or landing should not be made at all at any particular time or place. In addition the carrier reserves the right to arrange, at landing places, such periods of stoppage as may be necessary to ensure connections, the maximum duration of which periods of stoppage will be mentioned in the time-tables ; no responsibility concerning the making of connections can be accepted.

(3) Carriers are not liable if they prove that they and their agents have taken all necessary measures to avoid the damage or that it was impossible for them to take such measures. They are not liable if they prove that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, and that, in all other respects, they and their agents have taken all necessary measures to avoid the damage.

(4) If the carrier proves that the damage was caused or contributed to by the negligence of the party suffering damage, the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Para. 2.—(1) The liability of carriers is limited to the sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid such supplementary charge as is required.

(2) In that case the carrier will be liable to pay a sum not exceeding the declared value, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) The sum mentioned above shall be deemed to refer to the French franc consisting of sixty-five and a half milligrams of gold of millesimal fineness.

*Article 21.—Claims*

Claims must be addressed in writing to the carriers referred to in Article 22.

*Article 22.—Undertakings against which Action can be Taken. Jurisdiction*

Para. 1.—An action for return of a sum paid under the provisions of a contract of carriage can only be brought against the undertaking which received the sum.

Para. 2.—An action for payment concerning a C.O.D. consignment can only be brought against the first carrier.

Para. 3.—In the case of other actions arising under the contract of carriage the consignor having the right of disposition will have a right of action against the first carrier and the consignee who is entitled to delivery will have a right of action against the last carrier and further each party having the right of disposition may take action, under the provisions of Article 20, against the carrier who performed the carriage during which the event giving rise to the action took place. Once action has been taken the option concerning the party to be sued is extinguished. For actions arising under the provisions of Article 20 these carriers will be jointly and severally responsible to the consignor and consignee respectively.

Para. 4.—(1) Actions must be brought before the Court of the carrier's principal place of business. The national law of the court seised of the case shall apply.

(2) Nevertheless, actions arising under the provisions of Article 20, in connection with Article 1 paragraph 2, must be brought, at the option of the plaintiff, in the territory of a State which is a contracting party to the Convention of Warsaw, either

(*a*) before the court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made ; or

(*b*) before the court having jurisdiction at the place of destination.

(3) Questions of procedure shall be governed by the law of the Court seised of the case.

*Article 23.—Limitation of Actions*

Para. 1.—(1) The right to damages arising under the provisions of Article 20, in connection with Article 1 paragraph 2, shall be extinguished if an action is not brought within two years, which may be reckoned either from the date of arrival, or from the date on which the carriage stopped.

(2) All other rights arising out of the contract of carriage shall be extinguished if an action is not brought within a period of six months.

Para. 2.—The method of calculating the period of limitation, as well as the reasons for suspension or interruption of the period of limitation, shall be determined by the law of the court seised of the case.

*Article 24.—Legislative Provisions*

Where in any country legislative provisions conflict with these Conditions of Carriage, the latter shall be applicable only in so far as they do not conflict with such legislative provisions.

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